

18
No. 91-1526-CFY
Status: GRANTED

Title: Ferris J. Alexander, Sr., Petitioner
v.
United States

Docketed:
March 16, 1992

Court: United States Court of Appeals for
the Eighth Circuit

Counsel for petitioner: Weston, John H.

Counsel for respondent: Solicitor General

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Entry	Date	Note	Proceedings and Orders
1	Jan 21 1992	G	Application (A91-513) to extend the time to file a petition for a writ of certiorari from January 28, 1992 to February 27, 1992, submitted to Justice Blackmun.
2	Jan 23 1992		Application (A91-513) granted by Justice Blackmun extending the time to file until February 27, 1992.
3	Feb 19 1992	G	Application (A91-513) to extend further the time to file a petition for a writ of certiorari from February 27, 1992 to March 16, 1992, submitted to Justice Blackmun.
4	Feb 19 1992		Application (A91-513) granted by Justice Blackmun extending the time to file until March 16, 1992.
5	Mar 16 1992	G	Petition for writ of certiorari filed.
6	Apr 1 1992		Supplemental brief of petitioner Ferris Alexander filed.
8	Apr 17 1992		Order extending time to file response to petition until May 26, 1992.
9	May 27 1992		DISTRIBUTED. June 12, 1992
10	May 29 1992		Order further extending time to file response to petition until June 29, 1992.
11	Jun 5 1992		Brief of respondent United States in opposition filed.
12	Jun 10 1992		REDISTRIBUTED. June 26, 1992
14	Jun 22 1992	X	Supplemental brief of petitioner Ferris Alexander (Second Supplement) filed.
15	Jun 29 1992		Petition GRANTED. *****
17	Jul 20 1992		Order extending time to file brief of petitioner on the merits until September 2, 1992.
18	Jul 29 1992		Record filed.
		*	Partial proceedings United States Court of Appeals for the Eighth Circuit.
19	Jul 29 1992		Record filed.
		*	Original proceedings United States District Court, District of Minnesota (2 Boxes)
20	Aug 3 1992	D	Motion of petitioner for leave to enlarge questions presented for review filed.
22	Aug 5 1992		REDISTRIBUTED. September 28, 1992
23	Aug 26 1992		Brief amici curiae of ACLU, et al. filed.
24	Sep 1 1992		Order further extending time to file brief of petitioner on the merits until September 4, 1992.
25	Sep 2 1992		Brief amicus curiae of Video Software Dealers Association

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Entry	Date	Note	Proceedings and Orders
			filed.
26	Sep 2 1992	Brief amici curiae of American Library Asociation, et al.	filed.
27	Sep 2 1992	Brief amicus curiae of Feminists for Free Expression	filed.
29	Sep 2 1992	Brief amici curiae of American Booksellers, et al.	filed.
28	Sep 4 1992	Brief of petitioner Ferris Alexander	filed.
33	Sep 14 1992	DEFERRED APPENDIX METHOD TO BE USED.	
34	Sep 24 1992	Joint appendix	filed.
36	Sep 29 1992	Brief amicus curiae of Morality in Media, Inc.	filed.
35	Oct 5 1992	Motion of petitioner for leave to enlarge questions presented for review	DENIED.
38	Oct 6 1992	Order extending time to file brief of respondent on the merits until October 29, 1992.	
39	Oct 8 1992	Brief amicus curiae of Christian Legal Defense	filed.
40	Oct 20 1992	G Application (A92-323) extension of time to file reply brief on the merits, submitted to Justice Blackmun.	
41	Oct 21 1992	Application (A92-323) granted by Justice Blackmun extending the time to file until December 5, 1992.	
42	Oct 29 1992	Brief of respondent United States	filed.
43	Oct 29 1992	Brief amici curiae of Religious Alliance Against Pornography, et al.	filed.
44	Oct 29 1992	Brief amici curiae of National Family Legal Foundation, et al.	filed.
45	Nov 20 1992	SET FOR ARGUMENT TUESDAY, JANUARY 12, 1993. (2ND CASE).	
46	Nov 23 1992	CIRCULATED.	
47	Dec 4 1992	X Reply brief of petitioner	filed.
48	Jan 12 1993	ARGUED.	

91-1526

(1)

Supreme Court, U.S.
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No. _____

In The
Supreme Court of the United States
October Term, 1991

FERRIS J. ALEXANDER, SR.,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

**Petition For A Writ Of Certiorari To The
United States Court Of Appeals
For The Eighth Circuit**

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

- 1) Does RICO forfeiture constitute a prior restraint of the kind condemned in *Near v. Minnesota*, or otherwise violate the First Amendment, when applied to close a \$25 million chain of bookstores, video stores, and theaters, to confiscate all their property including five years' proceeds, and to burn their inventories, solely on the basis of seven obscene videotapes and magazines?
- 2) Does the forfeiture of a \$25 million media business along with a six-year prison term and fines in excess of \$200,000, all as punishment for seven obscene videotapes and magazines, violate the Eighth Amendment?

LIST OF PARTIES

Petitioner Ferris J. Alexander, Sr. and the United States of America as Respondent are the only parties to this action. Former Attorney General Richard Thornburgh, named in his official capacity as defendant in the civil case consolidated below with this one on appeal, was not a named party in the criminal case, *United States v. Alexander*, wherein Petitioner now seeks this Court's review. Petitioner has separately notified this Court of his belief that his co-defendants in the criminal trial below (Delores Alexander and Jeffrey Alexander, who were acquitted, and Wanda Magnuson), who did not pursue this matter on appeal, no longer have an interest in the outcome of this proceeding.

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**Petition For A Writ Of Certiorari
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PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the Court of Appeals is reported as *Alexander v. Thornburgh*, 943 F.2d 825 (8th Cir. 1991), and is reproduced as Appendix A to this Petition. The Court of Appeals' unreported order denying rehearing and rehearing en banc appears as Appendix D. The district court's reported opinion deciding the forfeiture issue, *United States v. Alexander*, 736 F. Supp. 968 (D. Minn. 1990), is reproduced as Appendix B; its unreported sentencing judgment and forfeiture orders are reproduced as Appendix C.

JURISDICTION

The United States Court of Appeals, Eighth Circuit, entered its opinion in this case on August 30, 1991, and

denied Petitioner's motion for rehearing on October 30, 1991. Petitioner has filed this petition within the extension this Court granted him, until March 16, 1992. This Court therefore has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The following constitutional provisions and statutes are reproduced at Appendix E:

United States Constitution, amendment I

United States Constitution, amendment VIII

United States Code:

18 U.S.C. § 1465

18 U.S.C. § 1466

18 U.S.C. § 1961(1)(B)

18 U.S.C. § 1962(a), (c)-(d)

18 U.S.C. § 1963(a).

STATEMENT OF THE CASE

This case presents the long-simmering issue which this Court in *Fort Wayne Books v. Indiana* concluded was unripe but recognized to be vitally important: whether on the basis of past speech subsequently determined to have been obscene, the government may confiscate and destroy an entire communicative business, including its large inventory of protected materials. The issue is unquestionably ripe in this case, where the government has obtained a final forfeiture order, and has closed virtually every adult bookstore in the Minneapolis/St. Paul area.

The Court of Appeals' decision below, sustaining blanket RICO forfeitures in obscenity cases, creates a dramatic split of authority in its conflict with decisions of the Fifth, Sixth, Ninth and Eleventh Circuits, and numerous state courts of last resort, all of which have invalidated legally indistinguishable remedies for obscenity violations.

Solely because Petitioner distributed seven magazines and videotapes determined at trial to be obscene,¹ the government has seized and closed his entire chain of thirteen bookstores, theaters, and video stores formerly engaged in disseminating officially-disfavored, albeit First Amendment-protected, erotic speech. In addition to confiscating all the related real and personal property and bank accounts, government has now *burned* these businesses' entire inventory consisting of over one hundred thousand books, magazines, and videotapes.

For over thirty years, Petitioner Ferris Alexander operated a chain of retail bookstores, theaters and video stores in the Minneapolis area;² he also conducted a wholesale book, magazine, and videotape business. Largely but not exclusively devoted to erotic materials, these businesses were notably successful: the government alleged that their annual revenues exceeded \$5 million.

In addition to the enormous local popularity of the erotic materials his businesses offered for sale and rental, Petitioner reasonably believed that they were well within the community standards of the Twin Cities area. Local officials had not prosecuted him for obscenity since the mid-1970s, when he was acquitted. Following several such acquittals and dismissals of obscenity charges against him, Minnesota officials announced they would no longer prosecute for obscenity unless the materials involved bestiality or children, materials which Petitioner's business did not sell. To Petitioner's knowledge,

¹ Prior to this indictment, the Petitioner had received no notice, much less any judicial determination, that either the federal government or local authorities considered the materials obscene. Nor did the indictment allege any prior convictions.

² Operating primarily in the Twin Cities area, Petitioner also operated businesses in Duluth and Rochester.

there had been no federal obscenity cases in the district since his earlier acquittal.³

In 1989, however, the government indicted Petitioner as part of its wide-ranging campaign to eliminate sexually-explicit materials from the marketplace. Under the aegis of the Justice Department's fledgling but ever-expanding National Obscenity Enforcement Unit, the government aggressively sought to destroy businesses engaged in erotic speech, an objective it touted publicly.⁴ Apparently because the Petitioner conducted a highly visible chain of businesses which dominated the Minneapolis market, the government targeted his "enterprise" for RICO forfeiture.

In May 1989, Alexander was charged under a 41-count federal indictment with obscenity, RICO, and

³ A mail order obscenity indictment was returned in Duluth shortly before Petitioner's indictment.

⁴ The Meese Commission had touted RICO forfeiture as a necessary means to "efficiently suppress the evils of obscenity." Complaining that ordinary obscenity prosecutions are not adequate to the task of stemming the tide of the American public's enthusiastic and growing consumption of adult entertainment, the Meese Commission expressly advocated blanket forfeitures for obscenity offenses as "an effective means to substantially eliminate" businesses that disseminate erotica. Attorney General's Commission on Pornography, *Final Report* 464 (1986). This strategy soon became Justice Department policy.

As head of the Justice Department's Obscenity Unit, Patrick Trueman expressed the government's wide-ranging designs to suppress erotic expression:

"To Trueman, whose squad has . . . helped put a half-dozen major producers and distributors . . . out of business, the neighborhood video store is the next likely target.

" 'We'll prosecute the video store owner as well as the producer and distributor,' Trueman said. 'You'll see that . . . as we announce more and more indictments.' " *Denver Post*, November 4, 1990.

various tax violations.⁵ As the sole basis for the RICO charges and attendant forfeiture allegations, the indictment charged him with 34 obscenity counts, alleging that five magazines and seven videotapes his businesses had sold were obscene.⁶

United States Magistrate Janice Symchych sustained Petitioner's pre-trial challenge to RICO and held the forfeiture provisions of 18 U.S.C. § 1963 facially unconstitutional for overbreadth, because they authorize the wholesale forfeiture of expressive businesses without regard for the censorial consequences thus visited upon protected speech. *United States v. Alexander*, 736 F. Supp. at 986-987. (App. 72-74.) Citing the numerous federal decisions striking down padlocking orders and license revocations as overly broad penalties for obscenity convictions, the magistrate also concluded that RICO forfeitures operate as an impermissible prior restraint. 736 F. Supp. at 989-991. (App. 78-81.) She therefore recommended that the trial court hold RICO forfeiture facially unconstitutional as a prior restraint. *Id.* at 981, 988, 990. (App. 58, 81, 119.)

⁵ Petitioner was convicted of four tax violations. The tax charges are immaterial to the issues Petitioner now raises, however, as they were not predicate offenses for the RICO counts, predicated solely on the alleged obscenity offenses.

⁶ This federal indictment alleged that Petitioner's materials violated community standards in a community where there had been: 1) no federal prosecutions of such over-the-counter, publicly prominent X-rated businesses since Petitioner was acquitted in the mid-1970s; 2) no local obscenity prosecutions against Petitioner's businesses in memory; and 3) no prosecutions at all for materials even remotely similar. Thus despite Petitioner's long-time status as a prominent state-wide media fixture, and with no notice of its change of position, the federal government targeted him for elimination in 1987. Ironically, several of the previously unprosecuted violations occurred as early as 1984 and 1985.

The district court, however, sustained the government's objection to this recommendation, and held that the RICO forfeiture remedy was neither overbroad nor a prior restraint, on grounds that the First Amendment imposes no limitation whatsoever upon the remedies the government may impose for obscenity offenses. 736 F. Supp. at 978-980. (App. 51-55.) The trial court deemed the First Amendment irrelevant, because "the law . . . treats an obscenity charge the same as any other criminal charge, be it bank robbery, narcotics trafficking, or firearms violations." *Id.* at 980. (App. 55.)

The court also discerned in the impending wholesale forfeiture of Petitioner's bookstores, theaters, and video stores "no necessary impact on expressive activity in the future." *Id.* (App. 54.) In fact, these forfeitures closed virtually every erotica outlet in the Twin Cities area.

Following a three-month jury trial, Petitioner was acquitted on 16 counts of obscenity, and convicted of 18 obscenity violations (involving a total of only seven items) which were the sole predicates for three RICO convictions.⁷ (App. 127.) In its sentencing order, the trial court assessed Mr. Alexander well over \$200,000 in fines and costs,⁸ and sentenced him to concurrent terms of 36 to 72 months. (App. 127-128, 132, 133, 162.) The 73-year-old Petitioner is currently serving this six-year prison sentence, which he does not ask this Court to review.

⁷ Specifically, the Petitioner was convicted of twelve counts of transporting obscene material in interstate commerce under 18 U.S.C. § 1465, and six counts of engaging in the business of selling or transferring obscene material under 18 U.S.C. § 1466.

⁸ The court imposed a fine of \$100,000 and a special assessment of \$950 (App. 132), approximately another \$100,000 in costs of his incarceration and supervised release (App. 133), and costs of prosecution in the amount of \$29,737.84. (App. 162.) In ordering Petitioner to pay the costs of prosecution, the court dismissed the fact that it was dismantling an entire chain of communicative businesses with: "Defendant created his criminal empire and now must pay for its destruction." (App. 162.)

In addition, however, although only seven items were found obscene, § 1963 of the RICO Act **required** that the district court order forfeiture of the entire chain of thirteen retail bookstores and video stores, along with his wholesale media distribution business. The forfeiture order encompassed all assets associated with these expressive businesses, including the ten parcels of real property which had housed them, their bank accounts, three company vehicles (two vans and a trailer), as well as \$8.9 million in estimated proceeds from the operation of these communicative businesses for the years 1985 through 1988. (App. 135-147.) The court also ordered forfeiture of all personal property, including:

"all 8mm projectors, television monitors . . . , video cassette tape players, video cassettes, magazines, other printed material, shelving and display material, . . . and other inventory." (App. 144.)

Accordingly, the government confiscated (and subsequently destroyed) these businesses' inventories of over one hundred thousand unlitigated, presumptively protected books, magazines, and videotapes, simply because seven items on other shelves were found unprotected.

The Eighth Circuit affirmed Petitioner's conviction, rejecting his arguments that RICO forfeiture of an entire expressive business for obscenity offenses violated the First and Eighth Amendments. (App. 21-25.) Relying entirely upon the Fourth Circuit's decision in *United States v. Pryba*, 900 F.2d 748 (4th Cir. 1989), *cert. denied*, 111 S. Ct. 305 (1990), the court concluded First Amendment analysis was simply irrelevant. *Alexander v. Thornburgh*, 943 F.2d 825, 834-835. (App. 21, 23.) The court apparently also adopted the Fourth Circuit's conclusion in *Pryba* that it need not review this sentence under the Eighth Amendment. *Id.* at 835-836. (App. 25.)

In October 1991, before the Court of Appeals had even acted on the Petitioner's rehearing petitions, the government destroyed the entire seized inventory of First

Amendment-protected materials from his wholesale distribution business, bookstores, and video stores. The federal marshal's office in Minneapolis trucked three tons of magazines, videotapes, and other inventory to a garbage processing plant in Elk River, Minnesota, where the magazines were burned and the videotapes destroyed by crushing.⁹

REASONS FOR GRANTING THE WRIT

This case squarely and dramatically presents the issue of RICO forfeitures of entire media businesses for numerically insignificant obscenity violations. In upholding such forfeitures, the decision below would destroy the central guarantee of the First Amendment: that government cannot punish a disfavored speaker by stifling future, presumptively protected speech, nor suppress a book because another was found unlawful.

This Court recognized the importance of this issue in *Fort Wayne Books, Inc. v. Indiana*, 489 U.S. 46 (1989), which was briefed and argued by Petitioner's present counsel. In *Fort Wayne Books*, this Court invalidated pre-trial seizures of expressive businesses in RICO/obscenity cases, but deferred consideration of First Amendment challenges to post-conviction forfeitures under the Indiana RICO statute. The Court concluded the issue was not ripe, where the state had not yet invoked such forfeiture remedies.¹⁰ At the same time, this Court noted the importance of these issues, particularly because then as now,

⁹ See *Minneapolis Star Tribune*, October 19, 1991 at 1B. These methods of destruction are particularly apt given the fate of "witches" in 17th century Salem, Massachusetts. "Men feared witches and burnt women," as Justice Brandeis wrote in *Whitney v. California*, 274 U.S. 357, 376 (1927). "Witches" were also put to death by crushing them under progressively heavier weights of stone.

¹⁰ "[W]e do not reach the question of the constitutionality of post-trial forfeiture . . . in this context. The case before us does not involve such a forfeiture." 489 U.S. at 65 n. 11.

"Petitioner's challenge to the constitutionality of the use of the RICO statutes to criminalize patterns of obscenity offenses calls into question the legitimacy of the law enforcement practices of several States, as well as the Federal Government. Resolution of this important issue . . . should not remain in doubt. 'Whichever way we were to decide on the merits, it would be intolerable to leave unanswered, under these circumstances, an important question of freedom of the press under the First Amendment; an unsettled and uneasy constitutional posture . . . could only further harm the operation of a free press.'" 489 U.S. 55-56, quoting *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 247, n. 6 (1974).

For these reasons, Justice Stevens would also have decided the RICO forfeiture issue in *Fort Wayne Books*; he urged the majority to invalidate post-conviction forfeitures as well as pre-trial seizures. 489 U.S. at 77, 84 (Stevens, J., concurring in part and dissenting in part).¹¹

This case presents a compelling occasion for doing so; it is the paradigm case for which this Court was presumably waiting when it deferred adjudication of the issue in *Fort Wayne Books*. It concretely and non-speculatively presents an actual post-trial judgment which starkly illustrates the constitutional abuses inherent in RICO forfeitures for obscenity offenses. The government has targeted a business engaged in erotic speech, and solely on the basis of the seven items determined to be obscene, it has imposed the RICO Act's ultimate, speech-

¹¹ Similarly, Justice Scalia in *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 252-253 (1990) (concurring and dissenting opinion), worried that RICO's "draconian sanctions for obscenity which make it unwise to flirt with the sale of pornography . . . perversely render less effective our efforts, through a restrictive definition of obscenity, to prevent the 'chilling' of socially valuable speech. State RICO penalties for obscenity, for example, intimidate not just the porn-shop owner, but also the general bookseller who has been the traditional seller of new books such as *Ulysses*."

stifling remedy: blanket forfeiture. By means of such forfeiture, the government has closed down an entire chain of 13 bookstores, theaters, and video stores engaged in erotic speech, to which the government is openly hostile. It has removed from circulation and destroyed those businesses' vast inventories of books, magazines, and videotapes, and has carted them off to be burned.¹²

If upheld, this forfeiture will signal a seismic shift in First Amendment doctrine, authorizing government for the first time to employ whatever remedies it chooses to punish unprotected speech, even if the effect is to broadly preclude future, protected speech. This holding defies the bedrock prohibition against prior restraint this Court announced in *Near v. Minnesota*, 283 U.S. 697 (1931), and opens the door wide to governmental suppression of officially-disfavored speech.

Such a rule fundamentally threatens the security of First Amendment rights in this country. In its most immediate and literal application, this rule would have allowed the state in *Jenkins v. Georgia*, 418 U.S. 153 (1974), to confiscate the entire theater chain or even the Hollywood movie studio once the obscenity conviction for exhibiting the film "Carnal Knowledge" was upheld by the Georgia Supreme Court. The federal government could likewise use that state conviction as a RICO predicate, and if it moved as aggressively as it has against Petitioner in this case, would have already dismantled the theater and movie studio, burning their film libraries before this Court ever had a chance to rectify the error.

The decision below, approving such a forfeiture and clearing the way for the government to burn First

Amendment-protected inventories of media materials, stands in direct conflict with this Court's decisions in *Near v. Minnesota* and its progeny. Under the rule of *Near*, innumerable state and lower federal courts have invalidated such prospectively-censorial remedies for speech-related offenses as per se violations of the First Amendment.

The Court of Appeals could sustain RICO forfeitures for obscenity only because it concluded that First Amendment analysis did not apply at all, flagrantly disregarding this Court's plain holding to the contrary in *Fort Wayne Books*, 489 U.S. at 66. As recently as its decision in *Simon & Schuster v. New York Crime Victims Board*, ___ U.S. ___, 112 S. Ct. 501 (1991), this Court reaffirmed that even where the state seeks to deprive criminals convicted of non-speech offenses of "the fruits of their crime," any such remedy which adversely impacts free speech and press must survive the most searching scrutiny.

The Eighth Circuit's opinion also directly conflicts with decisions of the Fifth, Sixth, and Eleventh Circuits, and numerous state courts, which have all applied the per se *Near* rule against prior restraints to invalidate RICO forfeitures or less severe prospective restraints on expressive businesses for obscenity offenses. The opinion below is most squarely at odds with the Arizona courts' resolution of the issue in *State v. Feld*, 157 Ariz. 88, 745 P.2d 146 (Ariz. App. 1987), cert. denied, 485 U.S. 977 (1988), in which the court specifically held that wholesale RICO forfeitures for obscenity violations would constitute a prior restraint, and therefore construed the state RICO Act as limited to forfeiting only the materials judicially determined to be obscene and proceeds from their sale. The Arizona Supreme Court denied review in *Feld* on August 4, 1987, and its rule has been consistently reaffirmed in the Arizona courts. See *State v. Bauer*, 159 Ariz. 443, 768 P.2d 1785 (Ariz. App. 1990).

The decision below also conflicts with the decision of the Ninth Circuit in *J-R Distributors v. Eikenberry*, 725 F.2d 482, 486 (9th Cir. 1984), rev'd. on other grounds sub nom.

¹² That censorship was the government's intended goal is confirmed by its closing these stores and destroying their constitutionally protected inventory. Otherwise the government would have sold them to prospective buyers who would undoubtedly have been eager to acquire and continue to operate these lucrative businesses.

Brockett v. Spokane Arcades, 472 U.S. 491 (1985), in which the court struck down similarly overbroad penalties for obscenity offenses under the First Amendment. Highlighting the necessity for this Court's guidance is the fact that this issue of RICO forfeitures for obscenity is pending in the Ninth Circuit, in *Adult Video Association v. Barr*, (Case No.90-55252, argued May 6, 1991).

A closely related question, whether the potentially similar obscenity forfeiture provisions of 18 U.S.C. § 1467 violate the First Amendment, is pending in the Fifth Circuit.¹³ Very recently in *United States v. California Publishers Liquidating Corporation*, 778 F. Supp. 1377 (N.D. Tex. 1991), the district court refused to order forfeitures under the discretionary provisions of 18 U.S.C. § 1467, and sharply rebuked the government for attempting to invoke such patently unconstitutional remedies:

"Forfeiture under these circumstances of truly de minimis use of the properties for the commission of the [obscenity] offenses simply serves no legitimate end; that is, no end other than destroying legal business enterprises simply because their stock in trade is sexually related materials." 778 F. Supp. at 1389.

"[T]he government's requested forfeiture of Great Western's printing facility is subject to close First Amendment analysis and likely would, if granted, constitute an impermissible

¹³ The importance of the obscenity/forfeiture issue to the major media organizations is demonstrated by the challenge to 18 U.S.C. § 1467 brought by the American Library Association, the American Booksellers Association, the Council for Periodical Distributors Associations, the International Periodical Distributors Association, the Satellite Broadcasting and Communications Associations of America, the Freedom to Read Foundation, the Magazine Publishers of America, the American Society of Magazine Editors, and the American Society of Magazine Photographers, in *American Library Association v. Barr*, ___ F.2d ___, 1992 WL 27165 (Fed. Cir. 1992), in which the court found their First Amendment claims nonjusticiable.

prior restraint of expression under *Near v. Minnesota* and its progeny." *Id.* at 1394.

Obviously, the use of RICO forfeitures in obscenity cases remains a pressing issue of tremendous practical importance, given the many on-going prosecutions under both federal and state RICO and obscenity statutes.¹⁴ In light of events subsequent to the *Fort Wayne Books* decision, particularly given the government's use of RICO's over-reaching remedies in this case to seize and to burn entire inventories of books, periodicals, and videotapes, this question has now gone unresolved for far too long.

¹⁴ In addition to the federal RICO provisions directly at issue here and potentially implicated in the scores of pending federal obscenity cases around the country, at least 15 states have their own RICO or similar provisions prescribing wholesale forfeiture in retribution for obscenity. See Ariz. Rev. Stat. Ann. § 13-2301 et seq. (West Supp. 1991); Colo. Rev. Stat. Ann. § 18-17-103(5)(b)(VI), -105(1)(b), -106(2) (West Supp. 1991); Conn. Gen. Stat. §§ 53-394, 53-397 (Supp. 1991); Del. Code §§ 1502(9)(a)(7), 1504(b), 1505(b) (Supp. 1991); Fla. Stat. Ann. §§ 895.02(1)(a)(29), 895.05(2)(a) (West Supp. 1991); Ga. Code Ann. §§ 16-14-3(9)(A)(xii), 16-14-6(a)(5), 16-14-7(a) (Supp. 1991); Idaho Stat. Ann. §§ 18-7803(a)(8), 18-7804(f) (Supp. 1991); Ill. Stat. Rev. ch. 38, ¶ 11-20 (Smith-Hurd Supp. 1991); Ind. Code Ann. §§ 34-45-6-1(2)(4), 34-4-30.5-3 (West Supp. 1991); Nev. Rev. Stat. §§ 207.420, 207.460 (Michie 1991); N.J. Stat. Ann. §§ 2C:41-1(e), 2C:41-3, 2C:41-4(a)(9) (West Supp. 1991); N.C. Gen. Stat. §§ 75-D-3(c)(2), 75-8 (Supp. 1991); Okl. St. Ann. §§ 1402(10)(v), 1405(A) (1991); Wash. Stat. Ann. §§ 9A.82.010(14)(s), 9A.82.100(4)(f) (1991); Wis. Stat. Ann. §§ 946.82(4), 946.86(1), 946.87(2)(a) (1991). Enforcement of these statutes varies widely, from Arizona where the courts have precluded such forfeitures by means of a limiting interpretation in *State v. Feld*, 745 P.2d 146 (Ariz. App. 1987), to Florida where the state is aggressively seeking forfeitures in obscenity cases.

I. MASSIVE FORFEITURES OF COMMUNICATIVE BUSINESSES FOR OBSCENITY OFFENSES ARE PROFOUNDLY AT ODDS WITH FIRST AMENDMENT DOCTRINE AS CONSISTENTLY APPLIED BY THIS COURT AND THE LOWER COURTS.

The application of the RICO forfeiture remedy to destroy entire expressive businesses is riddled with defects under the First Amendment, whether viewed from the perspective of facial overbreadth,¹⁵ or as creating the pall of self-censorship condemned in *Smith v. California*, 361 U.S. 147 (1959), and *New York Times v. Sullivan*, 376 U.S. 254, 278-279 (1964). Most clearly of all, however, the court below ignored the per se rule against prior restraints this Court announced in *Near v. Minnesota*, which dozens of state and federal courts have applied to strike down similar, if less drastic, prospectively censorial remedies for obscenity violations. Because the decision below is not only grievously in error but has already exacted such an irreparable toll in terms of Petitioner's First Amendment rights and those of the public, this Court's review is urgently required.

Quite simply, if the Court of Appeals' myopic vision of the First Amendment prevails, then all expressive networks are subject to wholesale confiscation for even de minimis errors of judgment. Newspaper chains, publishing houses, television and radio networks, and movie studios will all be chilled by the potentially lethal Sword

¹⁵ Cf. *Members of City Council of the City of Los Angeles v. Taxpayers For Vincent*, 466 U.S. 789, 797-798 (1984), in which this Court noted that such speech-suppressive statutes are

"unconstitutional on their face because . . . any attempt to enforce such legislation would create an unacceptable risk of the suppression of ideas. In cases of this character a holding of facial invalidity expresses the conclusion that the statute could never be applied in a valid manner."

of Damocles this sub silentio overruling of *Near v. Minnesota* would place over their heads for unprotected communicative conduct.

A. In Holding That Obscenity Violations Justify Blanket Forfeitures of Expressive Businesses, the Court of Appeals' Decision Conflicts with This Court's Prior Decisions in *Near v. Minnesota* and Numerous Other Cases Proscribing Such Remedies for Speech-Related Offenses.

In allowing the government to forfeit and destroy media businesses, the court below has ignored this Court's prior decisions. Most fundamentally of all, it erred in concluding that because obscenity is a crime, the First Amendment in no way limits the remedies the government may employ in obscenity cases. This Court's decisions mandate an entirely contrary conclusion: that the First Amendment interposes a per se rule against direct prior restraints upon presumptively protected future expression.

As this case so vividly demonstrates, the RICO Act requires the blanket forfeiture of any "enterprise" – bookstore, theater, network, or museum – involved in disseminating two "obscene" works. It therefore grants government authorities the power to impose an institutional "death sentence" upon speakers like Petitioner who have engaged in even limited examples of unlawful speech in the past.

In *Near v. Minnesota*, this Court struck down an analogous prior restraint, invalidating a statute which authorized an injunction against future publication in order to abate "malicious, scandalous and defamatory" periodicals as a public nuisance. Because nine previous editions of the *Saturday Press* contained such matter, the trial court had enjoined both its future publication and other, similar expression. The Court squarely held this remedy unconstitutional: unprotected speech such as defamation could be punished subsequent to its publication, but not by restraining other unlitigated speech.

Thus, although materials adjudicated obscene and proceeds directly attributable to their sale may be forfeited, to effect closure of the business itself by forfeiting all its assets, instrumentalities, and communicative inventory has a qualitatively different censorial effect by directly suppressing *other*, presumptively-protected materials which would be distributed in the future.

Petitioner in this case was found to have distributed only seven obscene items over a thirty-year history of engaging in protected erotic expression. Even if he had suffered many more convictions for unprotected speech, the rule prohibiting prior restraint would be the same under *Near*, 283 U.S. at 720, where the Court observed:

"It does not matter that the newspaper or periodical is found to be 'largely' or 'chiefly' devoted to the publication of such derelictions. If the publisher has the right, without previous restraint, to publish them, his right cannot be deemed to be dependent upon his publishing something else."

This Court has consistently repudiated government's attempts to finesse the First Amendment by resort to "mere labels," which cannot confer "talismanic immunity from constitutional limitations." *New York Times Co. v. Sullivan*, 376 U.S. 254, 269 (1964). In *Fort Wayne Books v. Indiana*, 489 U.S. at 67, the Court reaffirmed this principle, clearly mandating the application of First Amendment analysis to these provisions of the RICO Act: "[T]he state cannot escape the constitutional safeguards of our prior cases by merely recategorizing a pattern of obscenity violations as 'racketeering.'"

"As far back as the decision in *Near v. Minnesota*, this Court has recognized that the way in which a restraint on speech is 'characterized' . . . is of little consequence. . . . For example, in *Vance v. Universal Amusement Co.*, 445 U.S. 308 (1980), we struck down a prior restraint placed on the exhibitions of films under a Texas 'public nuisance'

statute, finding that its failure to comply with our prior case law in this area was a fatal defect." *Id.* at 66. (Citations omitted.)

Most recently in *Simon & Schuster v. New York Crimes Victims Board*, ___ U.S. ___, 112 S. Ct. 501 (1991), this Court staunchly reaffirmed that such remedies even for *non-speech-related* criminal activity violate the First Amendment where they operate invidiously to curtail protected speech, rejecting out of hand the state's formalistic arguments that First Amendment scrutiny should not apply. In *Simon & Schuster*, the Court invalidated New York's "Son of Sam" law, which required that any publisher or other "entity" pay over to the Crime Victims Board any funds it owed a person "accused or convicted of a crime" under a contract to produce a book or other work describing the crime.

First, this Court dismissed the state's contentions that First Amendment scrutiny should not apply, arguments which closely track those the government advances in defense of RICO forfeiture in obscenity cases. The state maintained, for example, that the discriminatory burden on certain speech did not trigger First Amendment scrutiny because the legislature did not *intend* to suppress speech about crime, much as the government has argued RICO forfeitures for obscenity are constitutionally immune because they allegedly are not *intended* to censor. The Court dismissed this contention as

"incorrect; our cases have consistently held that '[i]llicit legislative intent is not the *sine qua non* of a violation of the First Amendment.' . . . As we concluded in *Minneapolis Star*, '[w]e have long recognized that even regulations aimed at proper governmental concerns can restrict unduly the exercise of rights protected by the First Amendment.' " 112 S. Ct. at 509.

Next, in *Simon & Schuster* the state attempted to avert First Amendment scrutiny by reference to the fact that the law focused its requirements on any "entity" rather than specifically on the *media*. Likewise, the government has contended that the First Amendment is not relevant in this case

because RICO forfeitures target "racketeering enterprises," and constitute "punishment" rather than "prior restraint." This Court has without hesitation rejected such disingenuous, formalistic sophistries, noting in *Simon & Schuster*, 112 S. Ct. at 509, that such an argument

"falters on both semantic and constitutional grounds. Any 'entity' that enters into such a contract [is] by definition a medium of communication In any event, the characterization of an entity as a member of the 'media' is irrelevant for these purposes. The Government's power to impose content-based financial disincentives on speech surely does not vary with the identity of the speaker."

Similarly, the government's talismanic invocations of "racketeering" attempt to mask semantically the fact that where obscenity is the predicate offense, *by definition* RICO forfeiture applies to destroy the entire media business of which the unprotected speech was but a minute part. And on constitutional grounds, the government cannot escape First Amendment scrutiny of this censorial remedy merely on grounds that it is "punishment" for "criminal activity." As this Court made clear in *Simon & Schuster*, where speech is at stake this assertion merely begs the question whether such "punishment" exceeds the bounds set by the First Amendment. Certainly, this Court would not allow New York to impose the same invidious burden on "crime stories" simply by recharacterizing it as "punishment" rather than as restitution to victims.

The unconstitutional flaw in New York's victim compensation scheme was that it discriminatorily burdened, and inevitably would act to curtail, protected speech on the basis of its content: the law singled out speech about one's crimes. Because this law invidiously burdened speech on the basis of its content, the Court subjected it to strict scrutiny and concluded the content-based law was not necessary to advance the state's objective of compensating crime victims. Even assuming that the escrowed income represented "the fruits of crime," the

Court said, the state had no compelling need to single out the proceeds of protected "storytelling." 112 S. Ct. at 510.

RICO forfeiture poses much graver constitutional problems, for two reasons. First, the RICO forfeiture remedy is so broad that it operates not just as a burden but as a complete prospective *ban* on future speech by the offending business. Whereas the confiscation of funds under the Son of Sam law would certainly tend to chill and inhibit speech, it did not have the absolutely *preclusive* effect of RICO forfeiture. Second, the triggering criminal conduct is itself speech. Whereas the New York law singled out speech by specifying its proceeds as the sole source for compensating the speaker's crime victims, the conduct triggering liability was hard-core crime such as murder which did not implicate speech in the first instance, and thus open the door wide for government to target speakers of whom it does not approve.

The fact that the disfavored speech itself triggers RICO liability has a double significance. It means first of all that by definition, the draconian RICO forfeiture remedy will operate to shut down those businesses which were engaged in speech activities. Second, it means that the statute wreaks its destruction when the government has targeted officially-disapproved speech for obscenity prosecution, armed with the ability to eradicate the offending speaker from the marketplace of ideas, information, and entertainment. For these reasons, the First Amendment concerns are even more heightened here than in *Simon & Schuster*, and the courts below fundamentally erred in holding essentially that First Amendment scrutiny does not apply.

Justice Kennedy, concurring in *Simon & Schuster*, would have simply applied a *per se* rule to hold that the Son of Sam law's content-based discrimination violated the First Amendment, rather than the compelling interest analysis the majority applied 112 S. Ct. at 512-515. He pointed out that because the New York statute singled out speech for a burden on the basis of its content, it raised First Amendment problems over and above the content-neutral burdens that invoked compelling-interest analysis on equal protection grounds in cases like *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of*

Revenue, 460 U.S. 575 (1983). Government will *never* have sufficient justification for discriminating against protected speech on the basis of its content, Justice Kennedy suggested, and to apply even a compelling-interest balancing test "might be read as a concession that States may censor speech whenever they believe there is a compelling justification for doing so." 112 S. Ct. at 513.

Justice Kennedy's concerns are certainly realized in this case, where the government has violated an even more bedrock principle of First Amendment law: the *Near v. Minnesota* prohibition against prior restraints. If there is any *per se* rule limiting governmental restraints on speech, it is the rule from *Near* that past abuses of free speech cannot be redressed by measures which broadly and directly prevent one from speaking in the future. Because a contrary rule would allow government enormous discretion to stifle disfavored speech and speakers prospectively, this Court has held in *Near* and subsequently that government simply cannot punish offensive, unprotected speech by suppressing other, presumptively-protected speech in the future.

In the forfeiture context, "content neutrality" is a First Amendment vice, because it permits the government to suppress unlimited quantities of expressive materials, regardless of their content, solely because other material on an adjacent shelf has been determined obscene, just as in *Near* the state forbade future publication of the *Saturday Press* because past editions were deemed defamatory. Indeed, this sort of blanket restraint of future speech is such an egregious First Amendment violation that after the Court first denounced it in *Near*, to the knowledge of Petitioner's counsel it has come before this Court in only one other case, *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 417 (1971), in which the Court invalidated as a prior restraint a content-neutral order enjoining the distribution of "'pamphlets, leaflets or literature of any kind.'"

This Court made clear in *Fort Wayne Books* that the prior restraint doctrine, and all other principles of First Amendment review, fully apply in the RICO/obscenity context. Although *Fort Wayne Books* left undecided the issue of

RICO's post-conviction forfeiture remedies, the result is equally clear under this Court's prior decisions. The RICO Act as applied in obscenity cases is the most incomparably censorial legislative measure in memory, and the court below erred dangerously in upholding its application to destroy media businesses. RICO forfeitures must be invalidated as an overbroad response to obscenity offenses, if the bedrock rule of *Near v. Minnesota* is not to be eviscerated, and the chilling effect doctrine rendered meaningless.

B. The Eighth Circuit's Decision Upholding RICO Forfeiture Also Conflicts With Decisions of Numerous Other Circuits, and of Innumerable State Courts, Striking Down Indistinguishable Remedies for Obscenity Violations.

The Eighth Circuit's decision below, and the Fourth Circuit's opinion in *United States v. Pryba*, create a dramatic split of authority between those circuits and at least four circuits, along with innumerable state courts, which have struck down even less restrictive penalties for obscenity for overbreadth or as patently invalid prior restraints.

Following the unequivocal rule of *Near*, a multitude of courts have rejected attempts to punish obscenity by means of prior restraints considerably less drastic than RICO's outright forfeitures. With virtual unanimity, state and federal courts have blocked attempts to close bookstores and theaters as "nuisances" by padlocking or injunction, or by revoking their licenses, upon a showing that they have sold or exhibited obscenity in the past.¹⁶

¹⁶ In the following cases, courts have held unconstitutional nuisance laws which provided for the padlocking of businesses where obscenity offenses occurred in the past: *Universal Amusement Co., Inc. v. Vance*, 587 F.2d 159, 164-166 (5th Cir. en banc 1978), *aff'd.* on other grounds, 445 U.S. 308 (1980);

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Prior to these two RICO cases, virtually every court to consider the issue concluded that such statutes are

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Pollitt v. Connick, 596 F. Supp. 261, 269-272 (E.D.La. 1984); *People ex rel. Busch v. Projection Room Theater*, 17 Cal.3d 42, 130 Cal. Rptr. 328, 550 P.2d 600 (1976), cert. den. 429 U.S. 922 (1976); *General Corp. v. Sweeton*, 320 So.2d 668 (Ala. 1975), cert. den. 425 U.S. 904 (1976); *Kansas v. A Motion Picture Entitled "The Bet"*, 219 Kan. 64, 547 P.2d 760 (1976); *Gulf States Theaters of Louisiana v. Richardson*, 287 So.2d 480 (La. 1974); *New Riveria Arts Theatre v. Davis*, 219 Tenn. 652, 412 S.W.2d 890 (1967); *Society to Oppose Pornography, Inc. v. Thevis*, 255 So.2d 876 (La. App. 1972); *Giarrusso v. D'Iberville Gallery*, 295 So.2d 891 (La. App. 1974); *State ex rel. Blee v. Mohny Enterprises*, 289 N.E.2d 519 (Ind.App. 1973); *Sanders v. State*, 231 Ga. 608, 203 S.E.2d 153 (1974); *State ex rel. Field v. Hess*, 540 P.2d 1165 (Okla. 1975); *Commonwealth ex rel. Davis v. Van Emborg*, 347 A.2d 712 (Penn. 1975); *City of Minot v. Central Ave. News, Inc.*, 308 N.W. 2d 851 (N.D. 1981); *Parish of Jefferson v. Bayou Landing Ltd., Inc.* 350 So.2d 158 (La.1977), overruling La.App., 341 So.2d 23; *Mitchem v. State ex rel. Schaub*, 250 So.2d 883 (Fla.1971). See also *Nihiser v. Sendak*, 405 F. Supp. 482, 491-492 (N.D.Ind. 1974), vacated and remanded on other grounds, 423 U.S. 976 (1975), order re-entered August 16, 1976 (unpub.), aff'd. 431 U.S. 961 (1977); *Huffman v. Pursue, Ltd.*, 420 U.S. 592, 612, n. 23 (1975); cf. *Speight v. Slaton*, 415 U.S. 333 (1974); *State ex rel. Ewing v. "Without a Stitch"*, 307 N.E.2d 911 (Ohio 1974).

The following cases have held unconstitutional laws which allow a permit to be either revoked or denied because of a prior obscenity violation: *City of Paducah v. Investment Entertainment*, 791 F.2d 463 (6th Cir. 1986); *Gayety Theaters, Inc. v. City of Miami*, 719 F.2d 1550 (11th Cir. 1983); *Entertainment Concepts Inc. III v. Maciejewski*, 631 F.2d 497, 506 (7th Cir. 1980); *Genusa v. City of Peoria*, 475 F. Supp. 1199, 1207-09 (C.D.Ill. 1979), aff'd. 619 F.2d 1203, 1217-1220 (7th Cir. 1980); *Cornflower Entertainment, Inc. v. Salt Lake City Corp.*, 485 F. Supp. 777 (D.Utah 1980); *Bayside Enterprises, Inc. v. Carson*, 470 F. Supp. 1140 (M.D.Fla. 1979); *San Juan Liquors v. Consol. City of Jacksonville*, 480 F. Supp. 151 (M.D.Fla. 1979); *Natco Theatres Inc., v. Ratner*, 463 F. Supp. 1124 (S.D.N.Y. 1979); *Yuclan Enterprises Inc. v. Arre*, 488 F. Supp. 820 (D.Hawaii 1980); *Avon 42nd Street Corp. v.*

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facially invalid because they impose prior restraints of the type struck down in *Near*. Four federal circuit courts had so held, first in *Universal Amusement Co., Inc. v. Vance*, 587 F.2d 159, 164-166 (5th Cir. 1978), aff'd. on other grounds, 445 U.S. 308 (1980), in which all 14 judges of the en banc panel agreed that a business could not be padlocked because it had committed obscenity offenses. The Sixth, Seventh, and Eleventh Circuits agreed, holding that business licenses could not be denied or revoked in response to obscenity violations. See *City of Paducah v. Investment Entertainment*, 791 F.2d 463 (6th Cir. 1986); *Gayety Theaters, Inc. v. City of Miami*, 719 F.2d 1550 (11th Cir. 1983); *Entertainment Concepts Inc. III v. Maciejewski*, 631 F.2d 497, 506 (7th Cir. 1980).

As noted above, many state courts of last resort have also struck down prospective restraints imposed as punishment for obscenity. Typical of their reasoning is the Georgia Supreme Court's opinion in *Sanders v. State*, 231 Ga. 608, 613-614, 203 S.E.2d 153, 157 (1974):

"The injunction closing the store and padlocking it as a public nuisance necessarily halted the

(Continued from previous page)

Myerson, 352 F. Supp. 994 (S.D.N.Y. 1972); *Oregon Bookmark Corp. v. Schunk*, 321 F. Supp. 639 (D.Oregon 1970); *Perrine v. Municipal Court*, 5 Cal.3d 656, 97 Cal.Rptr. 320, 488 P.2d 648 (1971), cert. den. 404 U.S. 1038 (1972); *Kuhns v. Santa Cruz Co. Bd. of Sup'rs.*, 128 Cal.App.3d 369, 374-375, 181 Cal.Rptr. 1, 3-4 (1982); *City of Seattle v. Bittner*, 81 Wash.2d 747, 505 P.2d 126 (1973); *Alexander v. City of St. Paul*, 303 Minn. 201, 227 N.W.2d 370 (Minn. 1975); *City of Delevan v. Thomas*, 31 Ill. App.3d 630, 334 N.E.2d 190 (1975); *Hamar Theatres Inc. v. City of Newark*, 150 N.J.Super. 14, 374 A.2d 502 (1977); *People v. J.W. Productions*, 413 N.Y.S.2d 552 (N.Y.Cr.Ct. 1979); *State v. Bauer*, 159 Ariz. 443, 768 P.2d 175 (Ariz. App. 1988); see also *Intern. Soc. for Krishna Consciousness v. Eaves*, 601 F.2d 809, 832-833 (5th Cir. 1979); *Fernandes v. Limmer*, 663 F.2d 619, 629-630, 632 (5th Cir. 1981); cf. *Marks v. City of Newport Ky.*, 344 F. Supp. 675 (E.D.Ky. 1972); *Chulchian v. City of Indianapolis*, 477 F. Supp. 128, 131-132 (S.D.Ind. 1979), aff'd., 633 F.2d 27, 30 (7th Cir. 1980).

future sale and distribution of other printed material which may not be obscene, thereby . . . creating an unconstitutional restraint.

"[T]he overly broad coverage contemplated by this statute . . . creates a chilling effect upon the exercise of free expression. We cannot throw out the protected to rid ourselves of the unprotected as these laws would require. . . . We must use the deft, the precise and the remedial incision of the surgeon rather than the bludgeoning blow of the butcher to cut away cancerous obscenity. If we do not, the body politic will suffer too mortal a blow from our zeal to have a decent society, free of obscene publications but otherwise full of poetry and prose."

In *State v. Feld*, 155 Ariz. 88, 745 P.2d 146 (Ariz. App. 1987), the court likewise concluded that the state RICO statute's post-conviction remedies including forfeitures would be invalid prior restraints if they restricted future, presumptively-protected speech. The Arizona court invalidated such forfeitures insofar as they extended beyond the obscene materials themselves, or proceeds from materials determined to be obscene, and construed the statute accordingly. Citing *J-R Distributors*, 725 F.2d at 497, the court held that proceeds from sales of protected materials could not be forfeited, nor could neutral speech-facilitating property such as bookshelves be confiscated.

In *J-R Distributors, Inc. v. Eikenberry*, 725 F.2d 482, 493-496 (1984), *rev'd. on procedural grounds sub nom. Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491 (1985), the Ninth Circuit invalidated a law which sought to regulate obscenity by defining the business which disseminated it as a "moral nuisance," punishable by unlimited civil fines calculated on the basis of the businesses profits.¹⁷ The

¹⁷ Although denied precedential value by its reversal on procedural grounds, the *J-R Distributors* treatment of this issue has subsequently been implicitly endorsed in *Polykoff v. Collins*, 816 F.2d 1326, 1338-1339 (9th Cir. 1987).

court concluded this civil penalty provision was "an obviously unconstitutional feature" of the statute:

"The statute defines a 'moral nuisance' . . . as a 'place' where obscene materials . . . may be found. Thus, the civil fine, which is premised in part on profits 'attributable to the moral nuisance,' may be based on profits from the sale of protected materials in a place that is a moral nuisance solely because obscene materials were also sold or exhibited there." *Id.* at 493-494.

The *J-R Distributors* court held that "it is impermissible, in an anti-obscenity statute, to provide that the amount of a fine shall be based, even in part, on the proceeds from constitutionally protected material." *Id.* at 494. The statute's undue consequences for constitutionally protected speech were the central concern:

"By focusing on the place where the obscene materials are sold or exhibited rather than the unprotected materials themselves, the civil fine provision endangers protected speech. Courts that have addressed similar issues have held that abatement of a moral nuisance 'must be directed to the particular books or films which have been adjudged obscene . . . rather than against the premises in which the material is sold, exhibited, or displayed.' A contrary result would allow the government to punish protected first amendment expression simply because obscene speech was also disseminated from the same place." *Id.* at 494.

Similarly in the case at bar, once a few items were determined obscene, every transaction at every business Petitioner owned was retroactively deemed illegal, and its proceeds forfeited along with all the other assets, instrumentalities, and inventory.

The Eighth Circuit's decision in this case unquestionably conflicts with the Ninth Circuit's opinion in *J-R Distributors*, as it even more dramatically conflicts with decisions of the Fifth, Sixth, and Eleventh Circuits. Given the government's aggressive enforcement policies and the

patent detriment to important First Amendment interests, this Court's review of the RICO forfeiture issue is essential.

When the government is already setting flame to inventories of protected books, magazines, and videotapes, this issue has too long gone unaddressed.¹⁸

II. THE FORFEITURE OF A \$25 MILLION BUSINESS, IN ADDITION TO A SIX-YEAR PRISON TERM AND \$200,000 IN FINES, IS GROSSLY DISPROPORTIONATE PUNISHMENT FOR DISTRIBUTING SEVEN OBSCENE ITEMS, AND THE COURT OF APPEALS' SUMMARY REJECTION OF PETITIONER'S EIGHTH AMENDMENT CHALLENGE DIRECTLY CONFLICTS WITH DECISIONS OF THIS COURT AND OF THE NINTH, TENTH, AND SEVENTH CIRCUITS.

The sum of the penalties inflicted upon Petitioner is shockingly disproportionate to the offense, amassing the forfeiture of his \$25 million business atop a six-year prison term and over \$200,000 in fines, all for distributing seven magazines and videos deemed obscene. The court below essentially refused to consider Alexander's Eighth Amendment challenge to this egregiously cruel and unusual sentence, adopting the Fourth Circuit's curious position that no proportionality review is required of any sentence less than life imprisonment without parole. In so doing, it ignored this Court's interpretation of the Eighth Amendment as requiring proportionality review, and is in direct conflict with the Ninth, Tenth, and Seventh

¹⁸ "Play the man, Master Ridley; we shall this day light such a candle, by God's grace, in England, as I trust shall never be put out." - Hugh Latimer to Nicholas Ridley as they were being burned alive at Oxford for heresy (October 16, 1555). J.R. Green, *A Short History of the English People* (1874).

Circuits' rule requiring proportionality in RICO forfeiture cases.¹⁹

On historical grounds as well as under this Court's current proportionality analysis, this sentence merits close Eighth Amendment scrutiny and condemnation as "cruel and unusual punishment," and as an excessive fine. In 1790, even before it passed the Bill of Rights, the First Congress acted to abolish the common law doctrine of forfeiture of estate. RICO forfeitures represent the only significant revival of such blanket *in personam* forfeitures ever since that time. This historical fact, in combination with the mandatory, wholesale nature of the forfeitures mandated by the RICO Act, should make a sentence like that imposed on Petitioner immediately suspect under the Eighth Amendment.

This Court's contemporary approach to Eighth Amendment issues likewise mandates careful review of such a sentence. In *Robinson v. California*, 370 U.S. 660 (1962), the Court invalidated a statute making addiction to narcotics a criminal offense. The 90-day jail term imposed for this status offense was "cruel and unusual" even though the jail time was

"not, in the abstract, a punishment which is either cruel or unusual. But the question cannot be considered in the abstract. Even one day in prison would be a cruel and unusual punishment for the 'crime' of having a common cold." 370 U.S. at 667.

In *Solem v. Helm*, 463 U.S. 277, 284 (1983), this Court reaffirmed that the Eighth Amendment "prohibits not only barbaric punishments, but also sentences that are disproportionate to the crime committed." Although reviewing courts should grant the trial court and the legislature substantial deference, "no penalty is *per se* constitutional," the Court noted, citing *Robinson*, 463 U.S.

¹⁹ See *United States v. Busher*, 817 F.2d 1409 (9th Cir. 1987); *United States v. Harris*, 903 F.2d 770 (10th Cir. 1990); *United States v. Vriner*, 921 F.2d 710 (7th Cir. 1991).

at 290. Most recently, in *Harmelin v. Michigan*, ___ U.S. ___, 111 S. Ct. 2680 (1991), seven members of this Court reaffirmed that the Eighth Amendment entails a guarantee of proportionality in sentencing.

The Ninth Circuit consistently applied this Court's *Solem* analysis in *United States v. Busher*, 817 F.2d 1409 (9th Cir. 1987), concluding that the mandatory blanket forfeitures required by § 1963(a) raised proportionality questions even in a case implicating no First Amendment interests. The court reversed and remanded the forfeiture order, instructing the trial court to determine whether blanket RICO forfeiture was disproportionate:

"The court should be reluctant to order forfeiture of a defendant's entire interest in an enterprise that is essentially legitimate where he has committed relatively minor RICO violations . . . resulting in relatively little illegal gain in proportion to its size and legitimate income." 817 F.2d at 1415-1416.

In this case, not only was the Petitioner's business "essentially legitimate": he engaged in a business protected by the First Amendment for over thirty years, the millions of protected transactions dwarfing the dissemination of seven obscene items for which he now stands convicted.

Busher has become a cornerstone case applying *Solem v. Helm*, proportionality analysis to criminal forfeitures. Two other circuits have adopted this Ninth Circuit rule, in *United States v. Harris*, 903 F.2d 770, 777 (10th Cir. 1990), and *United States v. Vriner*, 921 F.2d 710, 712 (7th Cir. 1991). Another has cited it with approval: *United States v. Angiulo*, 897 F.2d 1169, 1211-1212 (1st Cir. 1990). See also *United States v. Robinson*, 721 F. Supp. 1541 (D.R.I. 1989).

In this case, however, the Court of Appeals repeated the error of the Fourth Circuit in *United States v. Pryba*, 900 F.2d at 757, by adopting the anomalous view that "*Solem v. Helm* does not require a proportionality review of any sentence less than life imprisonment without the

possibility of parole." 943 F.2d at 836 (App. 25.) "We cannot conclude," the court went on, "that the district court abused its discretion in sentencing Alexander." *Id.* This cursory dismissal of Alexander's Eighth Amendment challenge to this extreme judgment for obscenity offenses even ignores the fact that the trial court *had no discretion* with regard to forfeiture because § 1963(a) makes total forfeiture mandatory upon conviction.

The Eighth Circuit's decision on this point, and those of the Fourth Circuit on which it relied, clearly conflict with the Ninth, Tenth, and Seventh Circuits' application of proportionality in *Busher* and its progeny, a conflict which urgently requires this Court's resolution. In this regard among others, the court below has alarmingly misapprehended both Eighth and First Amendment doctrine, and the broader implications of its errors, particularly in their detriment to First Amendment rights, even more urgently calls for redress by this Court.

* * *

Whether from the perspective of the First Amendment's or the Eighth Amendment's restrictions on governmental power, the remedies the government has invoked below are monstrously inappropriate and unacceptable. They should be rejected because they exact far too great a cost from communicative businesses for an error involving expression, and because they extend too tempting an invitation for government to suppress disfavored speech.

Libel, slander, invasion of privacy, and obscenity all represent errors of judgment by media businesses. The unprotected nature of such speech offenses is usually discernible, if at all, only long after the challenged conduct. An essential theme of this Court's interpretations of the First Amendment has been that its protection serves as a necessary buffer between those engaged in controversial, robust, or error-prone expression and those who would censor it.

The ultimate vice of the RICO forfeiture remedy as approved by the court below is that the First Amendment buffer will be diminished to the vanishing point, to the quick

detriment of all speech, not just erotica. Just as *New York Times v. Sullivan* was predicated upon *Smith v. California*, First Amendment protection for newspapers, movie studios, and the electronic media will not long survive the deployment of obscenity-predicated RICO forfeitures. For if unlimited penalties may be assessed against media businesses for such mistakes, then there is no constitutional impediment to destroying our great newspapers with unlimited sanctions for libel or jeopardizing national security.

There is simply no principled distinction between the government's destruction of Petitioner's erotica businesses because of seven wrong guesses about community standards regarding obscenity, and silencing the *New York Times* for improperly publishing the advertisement about Mr. Sullivan. Both cases involve communicative material of interest to vast segments of the American people; both involve isolated instances of unprotected expression. Both were initially subjected to harsh economic consequences fatal to their continuing survival as media businesses, resulting in a total embargo on their messages to the public. The *New York Times* was ultimately reprieved by this Court. If Ferris Alexander is not, then Mr. Sullivan may well still have the last laugh.

CONCLUSION

For all the foregoing reasons, Petitioner respectfully urges this Court to grant a writ of certiorari and to reverse the decision below.

Respectfully submitted,

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App. 1

APPENDIX A

Ferris ALEXANDER, Appellant,

v.

**Richard THORNBURGH, in his official
capacity only as Attorney General
of the United States, Appellee.**

UNITED STATES of America, Appellee,

v.

**Ferris Jacob ALEXANDER, Sr., a/k/a
Pete Saba, Peter Saba, Paul Saba, John
Thomas, Bob Olson, Jim Nelson, Jim
Peterson, James Peterson, Robert Carl-
son, Frank Netti, Appellant.**

Nos. 89-5364, 90-5417.

**United States Court of Appeals,
Eighth Circuit.**

Submitted March 13, 1991.

Decided Aug. 30, 1991.

**Rehearing and Rehearing En Banc
Denied Oct. 30, 1991.**

**Before JOHN R. GIBSON and WOLLMAN, Circuit
Judges, and FLOYD R. GIBSON, Senior Circuit Judge.**

JOHN R. GIBSON, Circuit Judge.

**Following a four-month trial, a jury convicted Ferris
J. Alexander, Sr., on 24 counts¹ of a 41-count indictment.**

¹ A jury convicted Alexander on one count of conspiracy to defraud the United States by impeding the lawful functions of the Internal Revenue Service in violation of 18 U.S.C. § 371

(Continued on following page)

The counts included conspiracy to defraud the IRS, the sale of obscene magazines and videos, tax evasion, and RICO violations. Alexander appeals from his convictions and the application of the forfeiture provisions of 18 U.S.C. § 1963 (1988). Alexander argues that his conviction of engaging in a conspiracy to defraud the IRS should be reversed because: (1) the indictment alleged and the evidence showed, if anything, multiple conspiracies and not one conspiracy; and (2) the count was defective because it charged a general conspiracy rather than a conspiracy to violate a specific statute. He also argues that his convictions for transporting obscene materials must be reversed because the jury's verdicts are inconsistent. He also attacks the district court's² application of the forfeiture provisions of RICO, arguing that the application of RICO:

(Continued from previous page)

(1988); two counts of filing false income tax returns in violation of 26 U.S.C. § 7206(1) (1988); three counts of violating 18 U.S.C. § 1962 (1988) (RICO), including conspiracy to engage in or conduct an enterprise through a pattern of racketeering activity, receipt and use of income derived from a pattern of racketeering activity, and engaging in the conduct of an enterprise through a pattern of racketeering activity; twelve counts of knowingly transporting obscene material in interstate commerce for the purpose of sale or distribution in violation of 18 U.S.C. § 1465 (1988); five counts of engaging in the business of selling or transferring obscene material in violation of 18 U.S.C. § 1466 (1988); and one count of falsely misrepresenting a social security number for the purpose of impeding the IRS in violation of 42 U.S.C. § 408(g)(2) (1988) (now codified at 42 U.S.C.A. § 408(a)(7)(B) (West Supp.1991)).

² The Honorable James M. Rosenbaum, United States District Judge for the District of Minnesota.

(1) unconstitutionally criminalized non-obscene expressive material; and (2) violated the first and eighth amendments to the United States Constitution. He further argues that the obscenity standards set forth in *Miller v. California*, 413 U.S. 15, 93 S.Ct. 2607, 37 L.Ed.2d 419 (1973), violate his due process and first amendment rights. He also claims that the evidence was insufficient to support his convictions of filing a false income tax return, violating RICO, using a false social security number, and on all other counts. Finally, in a separate appeal, he appeals from the district court's³ entry of summary judgment in his civil suit filed against the government arguing that the use of obscenity as a predicate to RICO violated his first amendment rights. We affirm the convictions, and the orders of summary judgment and forfeiture.

The evidence presented at the four-month trial was far-reaching and spanned a thirty year period. Only a brief outline of that evidence is necessary for our purposes, and we will provide further details as required in analyzing the issues on appeal.

Alexander was in the adult entertainment business for more than 30 years selling magazines, showing movies, and eventually selling and leasing video cassettes. The evidence at trial established that Alexander set up sham corporations and operated many of his businesses using false names and names of employees.

³ The Honorable David S. Doty, United States District Judge for the District of Minnesota.

For example, evidence showed that from 1959 to 1976, Alexander used the name of an employee, Kenneth LaLonde, to conduct his businesses under the name of Kenneth LaLonde Enterprises. In 1969, Alexander hired an attorney, Robert J. Milavetz, who incorporated several corporations under the name of Kenneth LaLonde Enterprises. Alexander obtained licenses required for these businesses and opened bank accounts under LaLonde's name. Reports were also sent to the State of Minnesota under the name of Kenneth LaLonde Enterprises. The businesses were reported on LaLonde's individual tax return, and no corporate tax returns were filed.

Eventually, Milavetz had a falling out with Alexander and Alexander began using other attorneys, including Randall Tigie. In 1976, Tigie witnessed LaLonde's signature as the incorporator of two more corporations. Alexander consolidated the operation of his theaters and bookstores under these corporations, and on May 1, 1977, the name of LeRoy Wendling was substituted as the front name used to conduct Alexander's businesses. Alexander opened bank accounts for these corporations under the name of Wendling, another Alexander employee. These corporations were also reported to state and federal agencies showing Wendling as the owner. Corporate tax returns were filed and signed with a signature stamp of Wendling's name.

Wendling filed his personal tax returns listing Alexander's income. This arrangement continued until the end of 1980, when Wendling was fired, and the name "John Thomas" was substituted on some of these records and placed on the Wendling bank account. Alexander

admitted that the name "John Thomas" was "the name [he] used."

On December 27, 1984, In Sok Na, another Alexander employee, executed, as incorporator and first director, the articles of incorporation for ten different corporations. In Sok Na was a Korean immigrant and spoke little English. Alexander testified that he formed these corporations to avoid potential civil liability. The names of six of the corporations were in Finnish and four were in a dialect of the Philippines.⁴ None of these corporations filed tax returns. Two of the corporations were used to buy real estate and a bookstore.

In addition to using the names of LaLonde, Wendling, and Na, Alexander used a number of other names in operating bank accounts, obtaining licenses, and complying with various state and federal reporting regulations.

The government's evidence showed several examples of the lengths to which Alexander went to conceal his identity as the owner and operator of his various businesses. During the time Alexander ran his businesses under the name of LaLonde Enterprises, Alexander sent Milavetz to unemployment compensation hearings and instructed Milavetz to appear on behalf of Kenneth LaLonde or Kenneth LaLonde Enterprises. In one instance, LaLonde signed a license application for one of the theatres known as the "Flick." LaLonde appeared

⁴ The translation of these corporate names was profane, and the district court excluded the translation as having more prejudicial value than probative value.

before the St. Paul City Council in the licensing application proceedings acting as the "owner" of the business. After the City Council balked at granting the license, Tigie advised the Council that he represented Alexander and LaLonde and a lease existed between the two. Subsequently, Tigie filed a lawsuit in the United States District Court against the City of St. Paul and its council members on behalf of Alexander and LaLonde stating that a lease existed between LaLonde and Alexander. The city council subsequently granted the license in LaLonde's name. LaLonde testified that he became aware of the lawsuit by reading about it in the newspaper, that he never had a lease on the business, and that his signature verifying the complaint, notarized by Tigie, was a forgery. In later years, licenses were issued in LaLonde's name without his knowledge, but with the participation of Tigie, and continued after LaLonde left Alexander's employ.

The revenues generated from Alexander's retail and rental stores were brought to him at the central warehouse and main office where the cash was commingled and taken to various banks. Alexander deposited some of the cash in various accounts and converted the rest into large denomination bills, cashier checks, and money orders. The cashier checks and money orders were payable to various individuals and entities. All expenses were paid out of Alexander's primary bank accounts, and all merchandise was shipped from California to his warehouse, where it was wrapped, priced, and boxed for distribution to Alexander's retail outlets. Because of disorganized and incomplete records, the government had a difficult time attempting to calculate Alexander's income. Nevertheless, the government estimated that Alexander

underreported his 1982 gross receipts by \$1,322,135 and \$1,416,883 in 1983.

Alexander testified about many of these details. He confirmed that he used LaLonde, Wendling, and other individuals' names in the operation of his businesses, and that revenues from the businesses were reported on LaLonde's and Wendling's personal tax returns. He admitted that he purchased properties and submitted reports to state and federal agencies in other people's names. He attributed many of these decisions to Tigie and stated that he had no knowledge of some of the various businesses. Alexander also admitted that he signed a form on a Paine Webber investment account using a social security number that was not his social security number.

The jury found four magazines and three videos to be obscene, and these findings were the basis for convicting Alexander of transporting obscene material for the purpose of sale, selling obscene materials, and RICO counts.

After the return of guilty verdicts, the district court reconvened the same jury to hear a portion of the forfeiture proceeding under 18 U.S.C. § 1963(a)(2). The jury heard additional evidence, including Alexander's testimony regarding the forfeitability of his interest in the enterprise and the property that afforded him a source of influence over the enterprise. Thereafter, the district court reconvened without a jury for a further evidentiary hearing as to forfeiture of any interest Alexander had acquired or maintained in violation of section 1962 and of any property constituting proceeds obtained directly or

indirectly from racketeering activity. The government offered additional evidence of 30 magazines and 16 videos purchased or seized by the FBI during its criminal investigation, and an additional 418 videos and 9 magazines were admitted through the testimony of witnesses who had appeared as representatives of Alexander's wholesale sources.

The court sentenced Alexander to terms of imprisonment ranging from 36 to 72 months, all terms to run concurrently. *United States v. Alexander*, No. 4-89-85(1), Order and Judgment of Sentencing, slip op. at 3 (D.Minn. Aug. 13, 1990). In addition, the court imposed a fine of \$100,000 and a special assessment of \$950, and ordered Alexander to pay the costs of his incarceration (\$1,415.56 per month), his supervised release (\$96.66 per month), and the costs of prosecution (\$29,737.84) *Id.* at 6-7. Finally, pursuant to 18 U.S.C. § 1963(a)(2), the court ordered forfeiture of Alexander's interest in ten of fourteen pieces of commercial real estate in which the jury found beyond a reasonable doubt Alexander had an interest or which afforded Alexander a source of influence over the racketeering enterprise and which the court concluded were acquired, maintained, or derived from proceeds of the racketeering activity.⁵ *Id.* at 7 (incorporating Order and Judgment of Forfeiture (Aug. 6, 1990)). Alexander forfeited his interest in his wholesale business and thirteen retail businesses (bookstores and video stores) that were

⁵ Titles to the other four pieces of real estate Alexander used for his magazine and video businesses were held in the name of Dolores Alexander and were not forfeited to the United States as a result of the jury's forfeiture verdict.

used in the criminal enterprise, and \$8,910,548.10 in monies acquired, maintained, or constituting proceeds obtained from the racketeering activity in the years 1985 through 1988. *United States v. Alexander*, No. 4-89-85, Order and Judgment of Forfeiture, slip op. at 6, 11, 1990 WL 117882 (D.Minn. Aug. 6, 1990). Alexander also forfeited his interest in business assets and personal property. *Id.* at 6-11. This appeal followed.

I.

Alexander appeals the jury's verdict on the conspiracy count (Count 1) arguing that the count is defective in two ways. The indictment alleged that over the course of twenty years, Alexander engaged in a conspiracy to defraud the United States by defeating the lawful functions of the IRS. This has become known as a *Klein* conspiracy, taking its name from *United States v. Klein*, 124 F.Supp. 476 (S.D.N.Y.1954), *aff'd*, 247 F.2d 908 (2d Cir.1957), *cert. denied*, 355 U.S. 924, 78 S.Ct. 365, 2 L.Ed.2d 354 (1958).

Alexander contends that the district court must reverse his conviction on Count I because the indictment alleged a single overall conspiracy and the proof at trial showed not a single conspiracy, but a series of separate conspiracies. *Kotteakos v. United States*, 328 U.S. 750, 773-74, 66 S.Ct. 1239, 1252, 90 L.Ed. 1557 (1946). Alexander argues that there was not just one conspiracy for twenty years, pointing out that at the time the alleged conspiracy started some key members were in high school. He further argues that he had dismissed many of the members of the alleged conspiracy and that they had

no knowledge of later transactions. He asserts that looking at the totality of the circumstances, this case is a "series of scenes of a life of hustling" and not one conspiracy.

Whether a conspiracy is one scheme or several is primarily a jury question. *United States v. Wilson*, 497 F.2d 602, 604 (8th Cir.), cert. denied, 419 U.S. 1069, 95 S.Ct. 655, 42 L.Ed.2d 664 (1974). As this court has stated:

The general test is whether there was "one overall agreement" to perform various functions to achieve the objectives of the conspiracy. . . . A conspirator need not know all of the other conspirators or be aware of all the details of the conspiracy, so long as the evidence is sufficient to show knowing contributions to the furtherance of the conspiracy.

United States v. Massa, 740 F.2d 629, 636 (8th Cir.1984) (quoting *United States v. Zemek*, 634 F.2d 1159, 1167 (9th Cir.1980), cert. denied, 450 U.S. 916, 101 S.Ct. 1359, 67 L.Ed.2d 341 (1981)), cert. denied, 471 U.S. 1115, 105 S.Ct. 2357, 86 L.Ed.2d 258 (1985) (other citations omitted).

We have also stated that "[t]he existence of a single agreement can be inferred if the evidence revealed that the alleged participants shared 'a common aim or purpose' and 'mutual dependence and assistance' existed." *United States v. DeLuna*, 763 F.2d 897, 918 (8th Cir.), cert. denied, 474 U.S. 980, 106 S.Ct. 382, 88 L.Ed.2d 336 (1985) (citations omitted).

We are satisfied that the evidence supported a jury finding of a single *Klein* conspiracy, spanning many years and involving numerous individuals with the common

goal of impairing and impeding the IRS in determining the nature and extent of Alexander's businesses. We therefore reject Alexander's argument that Count I was defective because it failed to allege multiple conspiracies.

Second, Alexander argues that Count I of the indictment is defective because it should have charged him with a conspiracy to commit a specific crime under 26 U.S.C. § 7206(1) (1988), rather than a conspiracy to defraud under 18 U.S.C. § 371. Alexander relies on *United States v. Minarik*, 875 F.2d 1186 (6th Cir.1989), and *United States v. Mohnney*, 723 F.Supp. 1197 (E.D.Mich.1989).

In *Minarik*, the defendants were charged with willfully conspiring to defraud the United States by impeding, impairing, obstructing, and defeating the lawful functions of the Department of the Treasury in violation of 18 U.S.C. § 371. 875 F.2d at 1188. The government did not allege a conspiracy to commit an offense against the United States - another provision of 18 U.S.C. § 371, despite the fact that its evidence at trial and the bill of particulars alleged that the conspiracy was one to violate 26 U.S.C. § 7206(4) (concealment of assets with intent to evade or defeat assessment of tax). *Id.* at 1188-89. The Sixth Circuit stated that when Congress has enacted a specific statute addressing a given problem, thus creating a specific offense, "[t]he court should require that any conspiracy prosecution charging that conduct be brought under the offense clause" of 18 U.S.C. § 371, rather than under the defraud clause of that statute. *Id.* at 1193. In *Mohnney*, a Michigan district court dismissed the first count in an indictment alleging conspiracy to defraud the government because the government's accusation in the count was essentially a charge that defendants conspired

to violate 26 U.S.C. § 7206, and therefore, under *Minarik* the conspiracy had to be charged under the offense clause of the conspiracy statute. 723 F.Supp. at 1203.

Minarik is quite limited, however, to its facts. As that court explained:

[t]he "offense" and "defraud" clauses as applied to the facts of this case are mutually exclusive, and the facts proved constitute only a conspiracy under the offense clause to violate 26 U.S.C. § 7206(4). . . .

875 F.2d at 1187.

In *Minarik*, the defendants engaged in a narrow course of conduct directed at one object – to sell a house and get the money in an untraceable manner. This obviously is not the circumstance in this case in which Alexander's conduct is long-spanning, far-reaching, and involves many activities and events. Moreover, Alexander does not even argue that he lacked adequate notice of the charge he had to defend, and at least one court has held that this is the only holding of *Minarik*. *United States v. Reynolds*, 919 F.2d 435, 438-39 (7th Cir.1990), *cert. denied*, ___ U.S. ___, 111 S.Ct. 1402, 113 L.Ed.2d 457 (1991); *see also United States v. Bilzerian*, 926 F.2d 1285, 1301 (2d Cir.1991), *pet'n for cert. filed*, No. 90-1803 (May 22, 1991). We do not believe that *Mohney* is applicable or persuasive. We reject Alexander's argument that Count I was defective because it alleged a violation of 18 U.S.C. § 371.

II.

Alexander next argues his convictions for transporting and selling obscene materials must be vacated

because the jury's verdicts are inconsistent, and the inconsistency mandates a conclusion that there was insufficient evidence to support these convictions. Alexander contends that the jury verdicts are inconsistent because the jury found some items obscene in one count and not obscene in other counts. Specifically, Alexander points out that the jury returned a verdict of not guilty on some of the counts involving the magazine the *Fat Book*, and guilty verdicts as to other counts involving the same magazine. He also says a verdict inconsistency is shown by comparing the jury's guilty verdict on Count XXXIX involving the magazines "Sweet" and "Party,"⁶ and not guilty verdicts on all counts involving the single sale of the magazine "Sweet." (Counts XXVI, XXVII and XL).

Alexander's argument is spurious. The court instructed the jury that when a count alleges two different videotapes or magazines to be obscene, they must find only *one* of them to be obscene in order to return a guilty verdict.⁷ The verdicts therefore are not inconsistent.

⁶ The jury found some of these materials obscene, and their titles insofar as they are not descriptive of the contents, serve to create interest in the contents. As the argument is directed at the inconsistency of the evidence, and not the sufficiency, we believe it sufficient to simply identify the first magazine by its last word "Party," and the other by its first word "Sweet."

⁷ Alexander argues in his reply brief that the court's instruction is constitutionally impermissible because the instruction did not allow the jury to make a specific finding of

Alexander further argues that the jury did not apply contemporary community standards, but instead made impermissible distinctions based on values of taste, morality, and cultural rejection, resulting in inconsistent or compromise verdicts. Alexander's argument asks us to speculate on how the jury reached its verdicts, which we may not do. The district court defined obscenity in accordance with the definition of obscenity announced in *Miller v. California*, 413 U.S. 15, 24-25, 93 S.Ct. 2607, 2614-2615, 37 L.Ed.2d 419 (1973). Under its instructions, the question of obscenity is one of fact to be determined by the jury, and we cannot conclude that the jury's verdicts are inconsistent or the result of compromise. Moreover, this court has explained " 'inconsistency of a verdict on separate counts of an indictment does not entitle a convicted defendant to reversal of a judgment of conviction.' " *United States v. Martin*, 933 F.2d 609, 612 (8th Cir.1991) (quoting *United States v. Bryant*, 766 F.2d 370, 376 (8th Cir.1985), *cert. denied*, 474 U.S. 1054, 106 S.Ct. 790, 88 L.Ed.2d 768 (1986)). We reject Alexander's argument that his convictions for transporting and selling obscene materials should be reversed because the verdicts are inconsistent or the result of compromise.

(Continued from previous page)

which item in the two-item counts is obscene. Alexander, however, does not say that he objected to this instruction, and, in any event, we see nothing impermissible about such an instruction.

III.

Alexander also argues in both his civil and criminal appeals⁸ that the legal standard of obscenity enunciated in *Miller v. California*, 413 U.S. 15, 93 S.Ct. 2607, 37 L.Ed.2d 419 (1973), violates the fifth amendment's due process clause and the first amendment's freedom of speech provision. He claims that the rationales advanced for criminalization of sexually explicit materials are fundamentally antithetical to the constitutional guarantees of free speech and privacy. Alexander goes on to argue that statutes criminalizing the distribution of obscenity are inherently overbroad and that the *Miller* test fails to provide fair notice of prohibited speech and encourages arbitrary enforcement, which renders the federal obscenity statute void for vagueness and unduly chilling free speech.

We summarily reject Alexander's arguments. The district courts did not err in rejecting Alexander's invitation to overturn *Miller*. See *Fort Wayne Books, Inc. v. Indiana*, 489 U.S. 46, 57-58, 109 S.Ct. 916, 924-925, 103 L.Ed.2d 34

⁸ In his civil suit, Alexander sought: 1) a declaratory judgment that the application of the RICO statute to obscenity offenses violated his first amendment rights, and 2) a permanent injunction prohibiting the application of the RICO statute to obscenity offenses. The district court granted the Attorney General's motion to dismiss and motion for summary judgment. *Alexander v. Thornburgh*, 713 F.Supp. 1278 (D.Minn.), *appeal dismissed*, 881 F.2d 1081 (8th Cir.1989). Alexander's appeal in that case has been consolidated with the appeal from his criminal convictions, and to the extent the issues in his civil appeal are not moot, the issues are discussed in this opinion.

(1989) (reaffirming *Miller*). If this is to be done, it must be done by the Supreme Court.

IV.

Alexander argues that the application of the forfeiture provision of 18 U.S.C. § 1962 unconstitutionally criminalizes nonobscene expressive material. He argues that sexually explicit expressive materials are not obscene until a trier of fact in an adversarial judicial proceeding utilizing the three-part test enunciated in *Miller*, 413 U.S. at 23-24, 93 S.Ct. at 2614-2615, finds them to be obscene, and that the *Miller* test must be applied to *all* material the government seeks to restrain. Alexander relies on *Marcus v. Search Warrant of Property*, 367 U.S. 717, 81 S.Ct. 1708, 6 L.Ed.2d 1127 (1961), and *Vance v. Universal Amusement Company*, 445 U.S. 308, 100 S.Ct. 1156, 63 L.Ed.2d 413 (1980), to support his position. Alexander argues that *Near v. Minnesota*, 283 U.S. 697, 51 S.Ct. 625, 75 L.Ed. 1357 (1931), requires that any law restricting speech be tested for its operation and effect on protected speech, and that *Marcus* and *Vance* applied such a test in refusing to endorse obscenity laws that interfered with the sale of nonobscene materials. In *Marcus*, the Supreme Court invalidated the large-scale confiscation of expressive materials without a prior adversarial hearing as an impermissible prior restraint. 367 U.S. at 731-33, 81 S.Ct. at 1715-17. In *Vance*, the Court prohibited the "padlocking" of businesses for up to a year for past violations of obscenity laws as an impermissible prior restraint. 445 U.S. at 317, 100 S.Ct. at 1162. Alexander recognizes that these cases involved prior restraints, but argues that these cases show the need for an adversarial proceeding

focusing on the question of obscenity for *all* of the materials finally restrained.

Alexander continues in his argument focusing on section 1962(c), which requires that an accused conduct an enterprise through a pattern of racketeering activity. The nub of Alexander's argument is that to prove a criminal enterprise under RICO, *Miller* requires the government to charge and prove that: (1) all the materials sold by the enterprise taken as a whole are obscene; or (2) all the materials sold by his enterprise considered as individual works are obscene. He claims that the application of section 1962(c) to this case has created the absurd result of criminalizing the sale of millions of dollars of non-obscene materials by an enterprise that during its 20 years of existence sold just four magazines and three videotapes that were later found to be obscene.

The Fourth Circuit rejected many, if not all, of Alexander's arguments in *United States v. Pryba*, 900 F.2d 748 (4th Cir.), *cert. denied*, ___ U.S. ___, 111 S.Ct. 305, 112 L.Ed.2d 258 (1990). In *Pryba*, the defendants were convicted on seven counts of transporting obscene materials in interstate commerce for sale and distribution, and these counts, coupled with prior state obscenity convictions, were used as predicate RICO offenses. The *Pryba* defendants argued that the forfeiture order resulted in "the confiscation and restraint of a vast inventory of presumptively protected expressive material," and the application of the forfeiture provisions resulted in an unconstitutional prior restraint of protected activity. They also argued that the RICO forfeiture provisions violated the first amendment because the provisions lacked the

procedural safeguards necessary to insure that protected expression was not erroneously suppressed. *Id.* at 753.

The Fourth Circuit's answer to *Pryba*'s arguments directly applies to the nearly identical arguments made by Alexander. The court stated:

The forfeiture provided by 18 U.S.C. § 1467 does not violate the First Amendment even though certain materials, books and magazines, that are forfeited, may not be obscene and, in other circumstances, would have constitutional protection as free expression. There was a nexus established between defendants' ill gotten gains from their racketeering activities and the protected materials that were forfeited. The forfeiture did not occur until after defendants were convicted of violating various obscenity statutes and of participating in a racketeering activity, and until after it was established beyond a reasonable doubt that the proceeds from these criminal activities had been used to acquire the arguably protected publications.

Id. at 755.

The *Pryba* court rejected an argument that *Fort Wayne Books* required a different conclusion and stated further:

The forfeiture of nonobscene books, magazines and video tapes, after a conviction of racketeering involving the sale of obscene goods and after the jury has determined that the forfeited materials were acquired or maintained in violation of 18 U.S.C. § 1962 and afforded the *Prybas* a source of influence over the racketeering enterprise, does not violate the First Amendment. The fact that some of the materials forfeited are not obscene does not protect them

from forfeiture when the procedures established by RICO are followed, as they were in the present case.

Id. at 756.

Alexander argues that the decision of the Fourth Circuit in *Pryba* is not applicable as it dealt with a facial challenge to the RICO forfeiture statute and not to the unconstitutional application of section 1962.

We reject Alexander's distinction. As in *Pryba*, a jury convicted Alexander on the RICO charges brought under 18 U.S.C. § 1962(c) and predicate obscenity offenses under 18 U.S.C. § 1465. (Here, Alexander was also convicted under section 1466). Like *Pryba*, the jury found some items charged in the indictment obscene, some not, and was unable to reach a verdict on others. In both cases, after the jury reached a verdict finding violations of 18 U.S.C. § 1962, the same jury heard additional testimony on the issue of forfeiture, found that the defendants had an interest in property that gave them a source of influence over the enterprise, and ordered that certain of the assets, including the bookstores and video stores, be forfeited. *Pryba* differed from the case before us in that fifteen prior obscenity convictions of the corporate defendant were introduced in evidence. *Id.* at 758. Nevertheless, with this exception, the facts in *Pryba* are nearly identical to those here.

Furthermore, the government argues with persuasive force that in addition to the thirteen magazines and videos that were introduced, it was prepared to offer additional items not named in the indictment. On the state of this record, Alexander may not now argue that the jury

must have found all of the materials seized in the forfeiture proceedings obscene under *Miller*.

In his reply brief, Alexander asserts that *Sable Communications v. Federal Communications Commission*, 492 U.S. 115, 109 S.Ct. 2829, 106 L.Ed.2d 93 (1989), further supports his argument that the application of the RICO forfeiture provision unconstitutionally criminalized the sale of expressive material.

In *Sable*, the Supreme Court examined the constitutionality of a federal criminal statute prohibiting the sale of "indecent" or "obscene" commercial telephone messages. *Id.* at 117, 109 S.Ct. at 2832. The Court upheld the criminal prohibition against obscene messages, but struck down the ban on indecent messages. *Id.* Alexander argues that based on *Sable*, the government cannot criminally prosecute Alexander for selling non-obscene material any more than Congress could criminalize the sale of non-obscene messages.

Alexander's argument misses the mark. Alexander was not prosecuted for selling non-obscene material, and *Sable* has no bearing on the facts presented in this case. For the several reasons discussed, we reject Alexander's argument that the application of 18 U.S.C. § 1962 unconstitutionally criminalizes non-obscene expressive materials.

V.

Alexander next argues in both his civil and criminal appeals that the application of the RICO forfeiture

provisions violates the first amendment.⁹ Specifically, he contends that the forfeiture results in an unconstitutional prior restraint, imposes an unconstitutional chilling effect on constitutionally protected expression, and is constitutionally overbroad. The Fourth Circuit summarily rejected these same arguments in *Pryba*, concluding that "[o]bscenity is not protected by the First Amendment and a convicted racketeer may not launder his dirty money by investing it in materials that involve protected speech." 900 F.2d at 756.

Alexander, like the *Pryba* defendants, relies on *Fort Wayne Books* to support his position that the application of the RICO forfeiture provisions causes an unconstitutional prior restraint. There is, however, no similarity to the procedural posture in this case and the *pretrial* seizure condemned in *Fort Wayne Books*. 489 U.S. at 66, 109 S.Ct. at 929.

Alexander's convictions on obscenity counts may serve as a predicate to a RICO violation, and do not constitute a prior restraint. The First Amendment is not violated when there is a nexus established between the ill-gotten gains from racketeering activity and the protected materials forfeited. *Pryba*, 900 F.2d at 755.

Here, the RICO forfeiture provisions constitute a criminal penalty imposed following a conviction for conducting an enterprise engaged in racketeering activities. Courts have recognized the substantial difference

⁹ The district court rejected Alexander's facial challenge to the application of the RICO forfeiture provisions in *United States v. Alexander*, 736 F.Supp. 968, 977-80 (D.Minn. 1990).

between prior restraints and criminal penalties. See, e.g., *Arcara v. Cloud Books, Inc.*, 478 U.S. 697, 705-06 & n. 2, 106 S.Ct. 3172, 3176-77 & n. 2, 92 L.Ed.2d 568 (1986); *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 558-59, 95 S.Ct. 1239, 1246-47, 43 L.Ed.2d 448 (1975); *Kingsley Books, Inc. v. Brown*, 354 U.S. 436, 441-45, 77 S.Ct. 1325, 1327-28, 1 L.Ed.2d 1469 (1957).

Alexander next argues that the forfeiture imposes an unconstitutional chilling effect on protected expression. The Supreme Court has directly addressed the chilling effect from the application of the RICO forfeiture provisions to obscenity offenses and to first amendment protected materials:

It may be true that the stiffer RICO penalties will provide an additional deterrent to those who might otherwise sell obscene materials; perhaps this means . . . that some cautious booksellers will practice self-censorship and remove First Amendment protected materials from their shelves. But deterrence of the sale of obscene materials is a legitimate end of state anti-obscenity laws, and our cases have long recognized the practical reality that "any form of criminal obscenity statute applicable to a bookseller will induce some tendency to self-censorship and have some inhibitory effect on the dissemination of material not obscene." The mere assertion of some possible self-censorship resulting from a statute is not enough to render an anti-obscenity law unconstitutional under our precedents.

Fort Wayne Books, 489 U.S. at 60, 109 S.Ct. at 925 (citing *Smith v. California*, 361 U.S. 147, 154-55, 80 S.Ct. 215, 219-20, 4 L.Ed.2d 205 (1959)).

We reject Alexander's argument that the forfeiture provisions have an unconstitutionally chilling effect on first amendment rights.

We also reject Alexander's argument that the reach of the RICO forfeiture provisions is unconstitutionally overbroad. In *Arcara*, the Supreme Court upheld the closure of a bookstore that had been used as a front for prostitution. The Court stated that criminal and civil sanctions are not subject to "least restrictive means scrutiny" because a particular remedy "will have some effect on the First Amendment activities of those subject to sanction." 478 U.S. at 706, 106 S.Ct. at 3177.

Here, the court specifically and properly limited the forfeiture to profits, real estate, and businesses directly related to Alexander's interstate transportation and sale of obscene magazines and videos. The forfeiture is not unconstitutionally overbroad.¹⁰

VI.

Alexander argues that his sentence, primarily the forfeiture order, violates the eighth amendment prohibition against cruel and unusual punishments and excessive fines.

¹⁰ Alexander also argues that the court should have applied a remedy requiring forfeiture of proceeds which were proportional or traceable to the sale of obscene material. There is, however, no requirement that courts engage in such a test in applying the RICO forfeiture provisions. See, e.g., *United States v. Regan*, 858 F.2d 115, 119 (2d Cir.1988); *United States v. Kravitz*, 738 F.2d 102, 104-05 (3d Cir. 1984), cert. denied, 470 U.S. 1052, 105 S.Ct. 1752, 84 L.Ed.2d 816 (1985).

The Supreme Court has set forth a three-part test for determining whether a sentence violates the eighth amendment. The test requires a comparison of: (1) the gravity of the offense and the harshness of the penalty; (2) the sentences imposed for the same or similar offenses in the same jurisdiction; and (3) the sentences imposed for the same or similar offenses in other jurisdictions. *Solem v. Helm*, 463 U.S. 277, 290-92, 103 S.Ct. 3001, 3009-11, 77 L.Ed.2d 637 (1983).

A sentence imposed is entitled to "substantial deference" and we may only consider "whether the sentence . . . is within the constitutional limits." *Solem*, 463 U.S. at 290 and n. 16, 103 S.Ct. at 3009 and n. 16.

The district court imposed Alexander's prison sentence based on the Sentencing guidelines. 28 U.S.C. § 994 (1988). Alexander does not specifically attack his prison sentence. Instead, he appeals from the forfeiture order arguing once again that the income "from the two patterns of racketeering amoun[t] only to an infinitesimal percentage of his legitimate income," and that when the forfeiture is combined with the fine and prison sentence, the "harshness" of the penalty is "amazingly unfair."

Alexander cites one decision in which the Ninth Circuit remanded the case for a determination of whether the forfeiture was grossly disproportionate or excessive, *United States v. Busher*, 817 F.2d 1409, 1414-16 (9th Cir.1987), and contends that this case should be followed here.

Nevertheless, in the only other RICO-obscenity case in the country, the Fourth Circuit held that the forfeiture of a business with total annual sales of \$2 million as a

result of \$105.30 of material found to be obscene did not constitute a cruel and unusual punishment or an excessive fine prohibited by the eighth amendment. *Pryba*, 900 F.2d at 753, 756-57. The Fourth Circuit added that it was not even required to conduct a proportionality review because the defendants did not receive a sentence of sufficient severity. *Id.* at 757 (citing *United States v. Whitehead*, 849 F.2d 849, 860 (4th Cir.), cert. denied, 488 U.S. 983, 109 S.Ct. 534, 102 L.Ed.2d 566 (1988); *United States v. Rhodes*, 779 F.2d 1019, 1027-28 (4th Cir.1985), cert. denied, 476 U.S. 1182, 106 S.Ct. 2916, 91 L.Ed.2d 545 (1986)). "*Solem v. Helm* does not require a proportionality review of any sentence less than life imprisonment without the possibility of parole." *Pryba*, 900 F.2d at 757 (citation omitted). We cannot conclude that the district court abused its discretion in sentencing Alexander.

VII.

Finally, Alexander argues that the evidence was insufficient to support his convictions on the tax counts, social security counts, and all other counts. He adds in his reply brief that the evidence was insufficient to support his RICO convictions, arguing that the government failed to show that proceeds from a pattern of racketeering activity were invested in a criminal enterprise, or a criminal enterprise existed as required by 18 U.S.C. § 1962. We have carefully reviewed Alexander's arguments and record at trial. We are satisfied that there is ample evidence to support Alexander's convictions on all counts.

Having carefully considered all of Alexander's arguments, we affirm Alexander's convictions, and the orders of forfeiture and summary judgment.

APPENDIX B
UNITED STATES of America
v.

Ferris ALEXANDER, et al.

Crim. No. 4-89-85(1).

United States District Court,
D. Minnesota,
Fourth Division.

Jan. 24, 1990.

ORDER

ROSENBAUM, District Judge.

This matter is before the Court pursuant to objections made to a Report and Recommendation and an accompanying Pretrial Order each issued on September 30, 1989, by the Honorable Janice M. Symchych, United States Magistrate. Magistrate Symchych's recommendations and order are appended hereto. Also before the Court are defendants' objections to a Report and Recommendation issued by the Honorable Patrick J. McNulty, United States Magistrate, dated November 29, 1989. This recommendation is also appended hereto.

In reviewing a report and recommendation, the Court must consider the arguments and evidence, *de novo*. 28 U.S.C. § 636(b)(1); Rule 72(b), Federal Rules of Civil Procedure (Fed.R.Civ.P.); Local Rule 16(C)(2). After review of the Reports and Recommendations, the Court adopts each magistrate's reasoning and holdings, except Magistrate Symchych's recommendations 1, 2, 4, and 5.

In parts 1, 2, 4, and 5, Magistrate Symchych recommended that the Court find the RICO pretrial Restraining Order and consequent post-conviction forfeiture provisions, each pursuant to 18 U.S.C. § 1963 (§ 1963), unconstitutional, both facially and as applied. The magistrate found these provisions to be unconstitutionally overbroad and unconstitutional prior restraints. The magistrate, however, recommended against dismissing Counts VI, VII, and VIII.

The magistrate examined the language and scope of § 1963 and particularly examined this Court's Restraining Order, dated May 30, 1989. The order in question was issued upon the grand jury's return of the indictment herein. The relevant substance of the Restraining Order will be set forth below. In her review of the Restraining Order, the magistrate focused on its *ex parte* nature, its recordkeeping requirements, and its probable impact on the sale or distribution of protected materials. The magistrate then considered the same factors as they are implicated by RICO's forfeiture provisions. After her analysis, she also recommended that the Court find RICO's forfeiture provisions facially overbroad and a prior restraint.

The magistrate further urged the Court to strike these forfeiture provisions as applied. Noting the indictment identifies property which is to be forfeit in the event of conviction, she found the forfeiture sections of the indictment to be overly broad, encompassing "multiple bookstores, theatres, and videotape rental establishments," at least some of which, she determined, were presumptively protected by the first amendment. *Id.* at 13.

The government objects to these portions of the Report and Recommendation, arguing RICO is intended to provide powerful penalties, including forfeiture, to those engaged in racketeering activity. The United States then asserts that the nature of the RICO offense – be it narcotics, arson, extortion, or obscenity – is of no moment. The government further suggests RICO's forfeiture and restraining provisions are *in personam* and limited to interests in property acquired, maintained, or used in the actual violation of the RICO statute. As such the government claims RICO's forfeiture provisions are not overbroad, even in the obscenity context. The government concludes:

it is not the fact that the property is a bookstore, that triggers the forfeiture provision, but rather it is the owner's use of the property to conduct his illegal activity (the nexus) that brings the property within the ambit of the penalty provisions.

Government's Memorandum, p. 9 (citations omitted).

On the question of prior restraint, the government focuses upon the distinction between unlawful prior censorship and legitimate post-trial punishment. The government cites the language of *Near v. Minnesota*, 283 U.S. 697, 51 S.Ct. 625, 75 L.Ed. 1357 (1931), in support of the difference it perceives:

[if] the object of the statute is not punishment, in the ordinary sense, but suppression of the offending newspaper or periodical in the future

then the statute constitutes a prior restraint. *Id.* at 711, 51 S.Ct. at 629. The government urges rejection of the magistrate's recommendation to strike the Restraining Order.

For their part, defendants support the magistrate's Report and Recommendation. Indeed, they argue her recommendation is too narrow. They point to *Near's* proscription of prior restraints and to subsequent cases rejecting attempts to punish obscenity by means of restraint "considerably less drastic than the outright forfeitures imposed by RICO."¹ Defendants also raise the spectre of differing community standards. They stress the possibility that an obscenity conviction in one community could lead to forfeitures in another community espousing completely different values.

Analysis

I. The Restraining Order

The magistrate recommends lifting the Restraining Order on the grounds of unconstitutional overbreadth and prior restraint, finding the authorizing statute unconstitutional on its face and as applied. The Court addresses each of these issues separately.

¹ Defendants cite *City of Paducah v. Investment Entertainment*, 791 F.2d 463 (6th Cir.), cert. denied, 479 U.S. 915, 107 S.Ct. 316, 93 L.Ed.2d 290 (1986); *Gayety Theaters, Inc. v. City of Miami*, 719 F.2d 1550 (11th Cir.1983); *Entertainment Concepts, Inc. III v. Maciejewski*, 631 F.2d 497, 506 (7th Cir.1980); *Cornflower Entertainment, Inc. v. Salt Lake City Corp.*, 485 F.Supp. 777 (D.Utah 1980); *Genusa v. City of Peoria*, 475 F.Supp. 1199, 1207-09 (C.D.Ill.1979), modified, 619 F.2d 1203, 1217-20 (7th Cir.1980).

A. Facial Challenge to 18 U.S.C. § 1963(d)

1. Overbreadth

A statute is overbroad if it unconstitutionally infringes upon free speech while regulating another activity. In other words, a statute is overbroad "if in its reach it prohibits constitutionally protected conduct." *Grayned v. City of Rockford*, 408 U.S. 104, 114, 92 S.Ct. 2294, 2302, 33 L.Ed.2d 222 (1972). A law which arguably diminishes access to constitutionally protected materials is subject to first amendment overbreadth scrutiny. See *Upper Midwest Booksellers v. City of Minneapolis*, 780 F.2d 1389, 1391-92 (8th Cir. 1985).

The Court recognizes that invocation of the overbreadth doctrine is "strong medicine," which should be utilized "with hesitation, and then 'only as a last resort.'" *New York v. Ferber*, 458 U.S. 747, 769, 102 S.Ct. 3348, 3361, 73 L.Ed.2d 1113 (1982) (quoting *Broadrick v. Oklahoma*, 413 U.S. 601, 613, 93 S.Ct. 2908, 2916, 37 L.Ed.2d 830 (1973)). In considering a facial challenge to a Congressional enactment, the Court is mindful that it must "first ascertain whether a construction of the statute is fairly possible by which the question may be avoided." *Crowell v. Benson*, 285 U.S. 22, 62, 52 S.Ct. 285, 296, 76 L.Ed. 598 (1932); See *Harman v. Forssenius*, 380 U.S. 528, 535, 85 S.Ct. 1177, 1182, 14 L.Ed.2d 50 (1965). The Court must determine if there exists a constitutional interpretation of the statute which is consistent with Congress' intent. *United States v. Thirty-Seven Photographs*, 402 U.S. 363, 370-75, 91 S.Ct. 1400, 1405-07, 28 L.Ed.2d 822 (1971).

Clearly, some RICO pretrial restraining orders have no free speech implications whatsoever. Under 18 U.S.C. § 1963(d), restraints on property associated with RICO gambling, arson, extortion, or narcotics charges would not normally implicate the first amendment. Similarly, in the obscenity context, an order can be narrowly crafted to reach only those items which the grand jury has found probable cause to believe are obscene.²

The Court is confident that judges issuing pretrial restraining orders, pursuant to 18 U.S.C. § 1963(d), will seek to do so in a manner consistent with the Constitution. This assurance has been held sufficient to deny facial overbreadth challenges to statutes on first amendment grounds. See *Ferber*, 458 U.S. at 773, 102 S.Ct. at 3363. The Court, therefore, declines to adopt the magistrate's recommendation holding 18 U.S.C. § 1963(d) facially unconstitutional in RICO prosecutions founded on obscenity offenses. The Court concludes that such pretrial restraining orders must be reviewed on a case-by-case basis. See *American Library Assoc. v. Thornburgh*, 713 F.Supp. 469, 486 (D.D.C.1989). See generally *Fort Wayne Books, Inc. v. Indiana*, 489 U.S. 46, ___, 109 S.Ct. 916, 927-28, 103 L.Ed.2d 34 (1989).

² Whether these objects are ultimately forfeitable, pursuant to 18 U.S.C. § 1963(a)-(c), (e), is an entirely different question, dependent upon a jury's verdict that the property was obtained, used, or maintained in connection with the RICO violation beyond a reasonable doubt. *United States v. Pryba*, 674 F.Supp. 1518, 1521 (E.D.Va.1987).

2. Prior Restraint

Near and its progeny counsel that any future restraint of speech, because of past or anticipated content, is a prior restraint. *Near*, 283 U.S. at 707-15, 51 S.Ct. at 628-30; see *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 554-56, 95 S.Ct. 1239, 1244-45, 43 L.Ed.2d 448 (1975); *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 419, 91 S.Ct. 1575, 1578, 29 L.Ed.2d 1 (1971); *Freedman v. Maryland*, 380 U.S. 51, 57-60, 85 S.Ct. 734, 738-39, 13 L.Ed.2d 649 (1965); *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70-72, 83 S.Ct. 631, 639-40, 9 L.Ed.2d 584 (1963). Clearly, "[a]ny system of prior restraints of expression . . . bear[s] a heavy presumption against its constitutional validity." *Bantam Books, Inc.*, 372 U.S. at 70, 83 S.Ct. at 639.

Yet, not all prior restraints are impermissible. *Near*, 283 U.S. at 216, 51 S.Ct. at 631; *Southeastern Promotions, Ltd.*, 420 U.S. at 558, 95 S.Ct. at 1246. The cases make clear, however, that particular judicial safeguards and procedures must be followed before a prior restraint may be imposed. *Southeastern Promotions, Ltd.*, 420 U.S. at 559-60, 95 S.Ct. at 1247; *Freedman*, 380 U.S. at 58, 85 S.Ct. at 739.

An *ex parte* pretrial order or injunction presents particular prior restraint difficulties. Under such an order a defendant is required to "obey [the order] . . . pending review of its merits and . . . [is] subject to contempt proceedings" if he fails to do so. *Vance v. Universal Amusement Co., Inc.*, 445 U.S. 308, 319, 100 S.Ct. 1156, 1161, 63 L.Ed.2d 413 (1980). An *ex parte* pretrial order directed at a bookseller, at least some of whose wares have not been found obscene by a grand jury, raises grave constitutional

questions. The Supreme Court could have been speaking of this threat when it said:

Invariably, the Court has felt obliged to condemn systems in which the exercise of such authority was not bounded by precise and clear standards. The reasoning has been, simply, that the danger of censorship and of abridgement of our precious First Amendment freedoms is too great where officials have unbridled discretion over a forum's use. Our distaste for censorship - reflecting the natural distaste of a free people - is deep written in our law.

Southeastern Promotions, Ltd., 420 U.S. at 553, 95 S.Ct. at 1244.

This Court has recently rejected a facial challenge, albeit in a declaratory judgment action context, to the pretrial restraint provisions of 18 U.S.C. § 1963(d). *Alexander v. Thornburgh*, 713 F.Supp. 1278, 1292-93 (D.Minn.1989). Judge Doty reasoned that some pretrial restraining or seizure orders could certainly be unconstitutional in nature. *Id.* at 1292. He concluded, however, that "[t]he mere fact that § 1963 may be applied in a manner that results in an unconstitutional prior restraint does not render that section unconstitutional on its face." *Id.* at 1292.

This Court agrees that the mere possibility of a statutory restraint and a consequent penalty for trafficking in obscenity does not impermissibly chill the exercise of first amendment rights. Nor does the mere potential for statute-driven self-censorship comprise a constitutional infirmity. *Fort Wayne Books*, 489 U.S. at ___, 109 S.Ct. at 926. Indeed, "[t]hose who conduct their affairs close to the

boundaries of proscribed activity necessarily incur some risks." *Polykoff v. Collins*, 816 F.2d 1326, 1340 (9th Cir.1987). Proper, and properly chilling, penalties for obscenity, including fines, incarceration, and other criminal sanctions, have frequently been upheld. See *Fort Wayne Books*, 489 U.S. at ___ n. 4, 109 S.Ct. at 922 n. 4 (and cases cited therein); *Polykoff*, 816 F.2d at 1336-40; 511 *Detroit St. v. Kelley*, 807 F.2d 1293, 1298 (6th Cir.1986), cert. denied, 482 U.S. 928, 107 S.Ct. 3211, 96 L.Ed.2d 698 (1987).

For these reasons, this Court finds that § 1963's pretrial restraining order authority, standing alone, is not facially unconstitutional as a prior restraint. See generally *Alexander*, 713 F.Supp. at 1290-1291.

B. The Restraining Order, as Applied

The magistrate, after recommending invalidation of 18 U.S.C. § 1963(d) on its face, recommended that this Court strike the May 30, 1989, Restraining Order, as issued, on first amendment grounds.

In *Fort Wayne Books*, the Supreme Court emphasized procedural safeguards which must be followed prior to the seizure of obscene materials. *Fort Wayne Books*, 489 U.S. at ___, 109 S.Ct. at 927 (citing *Marcus v. Search Warrant*, 367 U.S. 717, 81 S.Ct. 1708, 6 L.Ed.2d 1127 (1961)). A seizure is permitted only if a "procedure 'designed to focus searchingly on the question of obscenity' " is present. *Id.* at ___, 109 S.Ct. at 927 (quoting *Quantity of Books v. Kansas*, 378 U.S. 205, 210, 84 S.Ct. 1723, 1725, 12 L.Ed.2d 809 (1964)). The Supreme Court held:

[w]hile the general rule under the Fourth Amendment is that any and all contraband, instrumentalities, and evidence of crimes may be seized on probable cause (and without a warrant in various circumstances), it is otherwise when materials presumptively protected by the First Amendment are involved.

Id. at ___, 109 S.Ct. at 927.

The magistrate correctly noted that the Restraining Order differs significantly from that imposed in *Fort Wayne Books*. Report and Recommendation, at 14. Notably, with the exception of those items seized pursuant to search warrant, there has been no actual seizure of expressive materials. The Restraining Order does not proscribe continued traffic in the specific items which have been charged as obscene in the indictment. The only items detained were those seized pursuant to warrant and held for evidence. Their duplicates, presumably, remain for sale or rental on defendants' shelves and racks. The magistrate found, however, that the present order could be characterized as generally freezing all of defendants' property and assets. *Id.* at 14-16.

All parties agree that under the terms of the Restraining Order, defendants have continued to conduct their businesses – businesses they contend are almost exclusively engaged in the dissemination of first amendment protected materials. Nothing has been presented to suggest that defendants have been significantly hampered in the orderly conduct of these enterprises. The Court, however, must examine each aspect of the imposed order to determine its validity in the face of the overbreadth and prior restraint challenges.

1. Inalienability of Property and Interests in Property

The Restraining Order prohibits the defendants from the sale or transfer of identified real estate, personal property, and various interests in property, absent approval of the Court. Restraining Order, ¶¶ 5, 6(b)-(d). For purposes of this analysis, the Court assumes that some of these property interests may have been secured, maintained, or derived from the sale of obscene materials.³ With the exception of the Court's restraint on alienability, defendants maintain their day-to-day interests in the property and have regular control over its use.

a. Overbreadth

The Restraining Order, as imposed, clearly reaches beyond the scope of allegedly obscene materials. The order covers real estate, intangible interests in property, and personal property, including "video cassettes, magazines, [and] other printed materials." Taken as a whole, this property is inextricably bound to defendants' ability to exercise first amendment rights. The order, however, explicitly permits continuation of defendants' ordinary course of business.⁴ Restraining Order, ¶ 5. The order, as

³ This assumption is in no regard tantamount to a holding in this regard. For forfeiture purposes, the government must prove the nexus between the property and the materials beyond a reasonable doubt. *Pryba*, 674 F.Supp. at 1521.

⁴ Ordinary course of business is defined in the order as: the following types of expenditures and transactions, made by the defendants directly or by and through

(Continued on following page)

fashioned, grants to defendants the use of the property in all respects save atypical transfers or sales.

(Continued from previous page)

A B Distributors, or Video Hits, Controlled Entities, if such expenditures and transactions are made in the ordinary course of business of the defendants:

- (a) purchase of inventory, supplies and equipment in an arm's length transaction;
- (b) payment of business liabilities including but not limited to accounts payable, mortgage and contract for deed payments, insurance premiums, license fees, utilities and taxes which existed at the time of the signing of this order and which arise hereafter;
- (c) ordinary use of supplies and equipment;
- (d) payment of reasonable business salaries not to exceed \$1,000 per week gross for any of the defendants;
- (e) payment, pursuant to an arm's length transaction, for the normal and average upkeep or maintenance of any real property, equipment or furnishings necessary for ordinary business operations;
- (f) currency transactions including deposits and bank transfers of funds from the accounts of the Controlled Entities into the business account to be established in accordance with this Order as directed below;
- (g) payment of reasonable attorney fees and expenses;
- (h) payment of ordinary living expenses upon application by the defendants in accordance with paragraph 12 of this Order.

Post-indictment Restraining Order, ¶ 1.

In this same regard, the order does not absolutely proscribe the sale or transfer of real estate, personal property, or holdings. Such transactions may be consummated with Court approval, which approval has been granted in one instance. *See Order*, dated June 29, 1989. In light of actual experience, therefore, the court finds that this aspect of the order does not impermissibly impinge upon defendants' personal exercise of free speech. Further, the order contains no provision forbidding the acquisition of new property which might, itself, be used in the exercise of free speech rights. Although the Restraining Order does extend beyond allegedly obscene materials, the Court finds that it does not burden those materials in a fashion which renders it constitutionally overbroad.

b. Prior Restraint

As set forth above, the Restraining Order imposes control over, rather than seizure of, property. Had the order called for the seizure of property, it may well have run afoul of the rule in *Fort Wayne Books, Inc. v. Little*, 489 U.S. at ___, 109 S.Ct. at 928-29. Aside from those few items seized for evidence pursuant to warrant, the remaining books, films, and videotapes have remained on defendants' property and available for purchase. *Id.* at ___, 109 S.Ct. at 929. Although the Restraining Order necessarily arises out of defendants' past speech, the proscription upon sale or transfer of defendants' real estate or the personal property contained therein does not impact upon defendants' future speech

or communication. *See Near*, 283 U.S. at 706, 51 S.Ct. at 627.

Certain of the property touched by the order, including noncommercial and purely personal property, plays no part in defendants' exercise of first amendment rights. As such, these items do not implicate the first amendment.

2. Performance Bond

The order permits defendants to offer a performance bond in lieu of compliance with its terms. Restraining Order, ¶ 11. No such bond has been posted nor has any party challenged the provision. Therefore, the Court declines to offer any opinion as to the propriety of such a bond.

3. Bank Accounts

Paragraph 6(a) of the restraining order forbids the transfer, sale, or concealment of:

all money, stock certificates, property or other interest in any account, certificate or safe deposit box maintained at any main or branch office of the following financial institutions and other partnerships and other corporations, including but not limited to officers at the addresses listed herein.

This restriction is subject to the provision permitting routine transactions in the ordinary course of defendants' businesses. Restraining Order. ¶¶ 1 and 5.

a. Overbreadth

The Restraining Order reaches all funds in designated institutions and, therefore, potentially touches defendants' ability to acquire and sell protected materials. But the Court finds that the "ordinary course" provision saves the order from constitutional flaw. Books, magazines, videotapes, and films may continue to be purchased, stocked, and sold as in the past. Auxiliary property necessary for the dissemination of those goods may also be obtained. Further, there is a provision for major transactions out of the ordinary course, upon approval of the Court. As such, the order maintains the status quo. It is not impermissibly overbroad since defendants' constitutional right to free speech are unimpeded. The Restraining Order preserves that state of affairs which allows defendants to vend protected materials.

b. Prior Restraint

The same "ordinary course" provision undercuts any prior restraint argument. Had the right to use funds been restrained, defendants' ability to carry on their protected speech activities would have been significantly impeded – a result clearly at odds with the first amendment. *See Fort Wayne Books*, 489 U.S. at ___, 109 S.Ct. at 928-29. But this has not occurred. Under these circumstances, the Court declines to strike § 1963, a provision which, on its face and in fact, permits defendants to carry on their regular business activity. The ordinary course provisions are not content based. Defendants are free to garner such

inventory as they choose and dispose of it as they see fit consistent with their prior business practices.

4. Recordkeeping

Paragraph four of the post-indictment restraining order mandates that:

All transactions . . . shall be recorded pursuant to generally accepted accounting principles and shall be evidenced by cash register slips, sales receipt journal, bank deposits, numerical invoices and order forms, disbursements, journal, checks, computer printouts, inventory lists, and any other ordinary business record. The defendants shall not use cashier's checks, money orders, or drafts to pay for any of the ordinary business transactions or personal expenses allowed herein or use said instruments for the purpose of transferring funds. All records and documents regarding the defendants' business transactions shall be maintained and provided to the government on a weekly basis.

Restraining Order, at ¶ 4.

The Court has approved, above, the portions of the order permitting defendants to proceed with activities in the ordinary course of business. Paragraph four simply records those transactions in an orderly fashion. This does not contravene the first amendment either for overbreadth or on the basis of prior restraint.

a. Overbreadth

Statutes which are overbroad, in a first amendment context, limit access to, or availability of, protected materials. *Upper Midwest Booksellers*, 780 F.2d at 1391. Mandatory recordkeeping has been subjected to overbreadth scrutiny. In *American Library Association v. Thornburgh*, 713 F.Supp. 469 (D.D.C.1989), the district court struck imposed recordkeeping in the context of the Child Protection and Obscenity Enforcement Act, 18 U.S.C. § 2257. The district court held that broad recordkeeping, which required movie producers to record the names and ages of all actors and actresses in their movies, was overbroad and impinged upon the producer's ability to make otherwise protected motion pictures. *Id.* at 477-79. The district court examined whether the recordkeeping demands were "tailored precisely" to the evil of child pornography or whether they infringed, prohibited, or otherwise hindered the dissemination of free speech. *Id.* at 479.

The recordkeeping provision here does not suffer from the same infirmities. The recordkeeping requirements are neither as demanding nor as broad as those stricken in *American Library Association*. Regular financial records are kept in the ordinary course of almost any business. The order does not require defendants to undertake any extensive procedure to comply. In the absence of any significant problems, none of which have been brought to the Court's attention, there does not appear to be sufficient impact upon freedom of speech to warrant the relief provided in *American Library Association*.

The recordkeeping, moreover, is "tailored precisely" to the evil sanctioned by the RICO obscenity charges. See

id. at 479. The requirement simply permits the tracing of property which the grand jury asserts to be potentially forfeitable. Other than requiring order and regularity in financial transactions, the burden is minimal and does not invalidate this portion of the order.

b. *Prior Restraint*

The recordkeeping aspect of the Restraining Order is a prior restraint in only the most remote sense. The weekly reporting requirement – certainly not an ordinary business practice – potentially detracts from defendants' available time and funds which might otherwise be available for protected speech. Yet, the order merely calls for defendants to turn over records on a weekly basis. There is no evidence of any significant burden on defendants' businesses arising out of this procedure. Although defendants may experience some minor inconvenience complying with paragraph four, the Court declines to declare that inconvenience to be of constitutional dimension.

5. One Bank Account

Paragraph eight of the Restraining Order states:

All income from any source received directly or indirectly by the defendants Ferris Jacob Alexander, Dolores Alexander and Jeffrey Alexander, their agents or assigns, and by or through any of the Controlled Entities, corporations or partnerships in the ordinary course of business as defined above shall be placed in one checking account located at The Union Bank and Trust, 312 Central Avenue Southeast, Minneapolis,

Minnesota and all expenses paid in the ordinary course of business as defined above including but not limited to employee salaries, inventory, supplies, utilities, rent, mortgage or contract for deed payments, insurance premiums, taxes and general overhead shall be paid out of said account.

a. *Overbreadth*

For many of the same reasons just discussed, this requirement is not impermissibly overbroad. The requirement is something of a burden merely because it is unusual. In addition, certain of the controlled entities are located outside the Twin Cities metropolitan area.

The rationale underlying the provision and its actual effect mitigate against a finding of unconstitutional overbreadth. The requirement clearly provides a benefit in terms of simplicity: all of defendants' transactions, since the date of the Restraining Order, are conducted through one account. The only restriction on use of the funds is that such use be in the ordinary course of business. There is no proscription on the accession, maintenance, or sale of any item whatsoever. In the absence of any content-based restriction, this is not an impermissibly overbroad requirement.

b. *Prior Restraint*

Since defendants' funds remain available for acquisition and dissemination of arguably protected material, the Court finds the single bank account requirement is

not a prior restraint. The fact that some of defendants' businesses are located at a distance from the Union Bank and Trust may incidentally complicate some transactions. See *American Library Association v. Thornburgh*, 713 F.Supp. at 477-79 (extensive investigative and traveling requirements may impermissibly infringement upon the exercise of protected speech). Common sense suggests, however, that many difficulties may be overcome through regular mail or telephonic correspondence. But in the absence of evidence of such difficulties, and none have been shown thus far, the operant fact remains defendants' unrestricted access to funds regularly used to purchase and sell their wares. Defendants have expressed no difficulties in conducting business operations out of one account, and the Court stands ready to consider any adjustments which may be appropriate. Upon the information before the Court, however, paragraph eight is constitutionally sound.

6. Monitoring

Paragraph nine of the restraining order provides:

The Federal Government shall designate an individual with business and accounting experience to monitor the operations of the Controlled Entities as well as of the defendants' financial affairs to ensure that the assets of said entities and persons are not dissipated or wasted in violation of this order. Said monitoring shall include but not be limited to a twice monthly review of the books and records of the Controlled Entities and the defendants. The designated individual shall be compensated by the

defendants as an expense in the ordinary course of business.

Restraining Order, ¶ 9.

This provision has not been implemented. In the absence of any implementation, the Court expresses no thoughts on its legality.

Having examined each aspect of the Restraining Order, the Court concludes that the limitations placed on defendants' property pass constitutional muster. The Court, therefore, declines to adopt the magistrate's recommendation to lift the Restraining Order.

II. Post-trial Forfeiture

The magistrate recommended that the Court declare 18 U.S.C. § 1963(a)-(c), (e), RICO's post-trial forfeiture provisions, unconstitutional both facially and as applied. She concluded the provisions were overbroad and a prior restraint. Again, the Court addresses each question individually.

A. Facial Challenge

In *Fort Wayne Books*, the Supreme Court declined to assess the constitutionality of the Indiana RICO statute's post-trial forfeiture section in an obscenity context.⁵

⁵ The Court specifically bypassed the question: for the purpose of disposing of this case, we assume without deciding that bookstores and their contents

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Similarly, Judge Doty did not reach the issue.⁶ *Alexander v. Thornburgh*, 713 F.Supp. at 1294. At least one district court, however, has upheld the constitutionality of the forfeiture provision in the face of a prior restraint challenge. *United States v. Pryba*, 674 F.Supp. 1504, 1512 (E.D.Va.1987).

1. Overbreadth

Defendants claim RICO's forfeiture provisions are overbroad since property, some of it clearly protected literature or video tapes, may be subject to seizure. Defendants contend this impermissibly infringes upon constitutionally protected expression.⁷

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are forfeitable (like other property such as a bank account or yacht) when it is proved that these items are property actually used in, or derived from, a pattern of violations of the state's obscenity laws.

Fort Wayne Books, 489 U.S. at ___, 109 S.Ct. at 928 (footnote omitted).

⁶ The Court stated:

This Court finds that the present action for declaratory and injunctive relief also does not present the opportunity to determine whether RICO's forfeiture provision is unconstitutional as a prior restraint when the property forfeited consists of a defendant's entire interest in an enterprise which sells materials presumptively protected by the first amendment.

Alexander v. Thornburgh, 713 F.Supp. 1278, 1294 (D.Minn.1989).

⁷ As a threshold matter, the Court rejects defendants' suggestion that the § 1963 language is unacceptably vague as

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The broad language of RICO's forfeiture provision and the consequent penalties do not impermissibly chill future expression. The Supreme Court, addressing this issue in *Fort Wayne Books'* pretrial restraining order, noted:

It may be true that the stiff[] RICO penalties will provide an additional deterrent to those who might otherwise sell obscene materials; perhaps this means . . . that some cautious booksellers will practice self-censorship and remove first amendment protected materials from their shelves. But deterrence of the sale of obscene materials is a legitimate end of . . . obscenity laws and our cases have long recognized the practical reality that "any form of criminal obscenity statute applicable to a bookseller will induce some tendency to self-censorship and have some inhibitory effect on the dissemination of material not obscene."

For Wayne Books, 489 U.S. at ___, 109 S.Ct. at 925 (quoting *Smith v. California*, 361 U.S. 147, 154-55, 80 S.Ct. 215,

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written. The Court finds the RICO forfeiture language sufficiently concise to pass constitutional muster. Absolute precision is not constitutionally mandated. See *Pryba*, 674 F.Supp. at 1511.

That there may be marginal cases in which it is difficult to determine the side of the line on which a particular fact situation falls is no sufficient reason to hold . . . language too ambiguous to define a criminal offense.

Roth v. United States, 354 U.S. 476, 491-92, 77 S.Ct. 1304, 1313, 1 L.Ed.2d 1498 (1957).

219-20, 4 L.Ed.2d 205 (1959)). As noted previously, courts have recognized that individuals and entities conducting their businesses near the edge of proscribed activity necessarily undertake some risks. *Polykoff*, 816 F.2d at 1340. The Court, therefore, rejects the defendants' suggestion that RICO's forfeiture language is impermissibly threatening.

Substantively, defendants claim that RICO's forfeiture provisions exact penalties of disproportionate size. Clearly, a forfeiture is a penalty, requiring one who has been convicted to disgorge that which has been accumulated. Under RICO, it is a special penalty in that the items to be surrendered must actually have been used in, or derived from, the RICO pattern of violations. 18 U.S.C. § 1963(a)-(c), (e). Such a penalty is analogous to statutory penalties which are indisputably permissible. Certainly, the imposition of a fine following a conviction has been approved, even when the fine is greater than any traceable amount of illegally garnered assets. *Polykoff*, 816 F.2d at 1339; 511 *Detroit*, 807 F.2d at 1299; see *Alexander*, 713 F.Supp. at 1289.

More importantly, RICO guarantees an equivalence between the forfeiture of assets and the criminal acts Congress sought to proscribe when it passed RICO: that which is to be given up in forfeit is the product and profit of the RICO offense. In other words, property or assets garnered as a result of proscribed activity is that which is to be surrendered as a partial penalty. The fairness of this scheme is assured by the fact that a jury must call for its surrender upon proof beyond a reasonable doubt. *Pryba*, 674 F.Supp. at 1521.

Of course, even in the absence of any forfeiture, the same funds and assets could be lost to defendants pursuant to the general fine statute.⁸ The issue is that each penalty, whether fine or forfeiture, may possibly deprive defendants of the means to continue disseminating protected materials – and the public could lose access to items which are in no way illegal or obscene.⁹

Realistically, bookstores, theaters, and places of public discourse have faced regulation and possible seizure before. While the issue has never been squarely addressed, it does not appear that closures based upon a fire code violation or health hazard would present problems of overbreadth. See *Arcara v. Cloud Books, Inc.*, 478 U.S. 697, 705-07, 106 S.Ct. 3172, 3176-77, 92 L.Ed.2d 568 (1986). Similarly, the indictment before the Court charges a tax violation which, if upheld after trial, could call for substantial payment of amounts owing. The taxes and penalties, as well as any fine amount, could touch on protected assets in the event of seizure or sale.

The Court is disinclined to strike a statutory penalty, which may otherwise be lawfully imposed, simply because defendants have been charged with violating the

⁸ 18 U.S.C. § 3571(b)(3) contemplates a fine of \$250,000 per felony conviction. See 18 U.S.C. § 1963. There are 48 counts in this indictment.

⁹ The magistrate concluded the fine and forfeiture penalties were distinct on the basis that forfeiture could encompass vast holdings of a defendant unrelated to the criminal activity. The Court does not deem the distinction to be significant. A fine exceeding \$1,000,000 – certainly a possibility here – could, in all likelihood, touch upon a significant portion of defendants' assets, some of them non-expressive.

RICO obscenity provisions or because the res to be surrendered has a speech or first amendment flavor. It is clear that the Supreme Court has found obscenity to be without first amendment protection. See *Miller v. California*, 413 U.S. 15, 23, 93 S.Ct. 2607, 2614, 37 L.Ed.2d 419 (1973). Some publications or video materials may fall on one side or the other of the protected speech/proscribed obscenity line. But the law defines a point over which one travels at his hazard. The mere fact that there is a penalty for going beyond that point does not bar a dollar penalty, either by fine or forfeiture.

2. Prior Restraint

For many of the same reasons, the forfeiture provisions of 18 U.S.C. § 1963(a)-(c), (e) do not impermissibly restrain free speech. Unlike administrative actions, such as movie censorship, *Freedman*, 380 U.S. at 58, 85 S.Ct. at 738-39, and license revocation, *City of Paducah v. Investment Entertainment, Inc.*, 791 F.2d 463, 470 (6th Cir.), cert. denied, 479 U.S. 915, 107 S.Ct. 316, 93 L.Ed.2d 290 (1986), which may not be undertaken without procedural safeguards, RICO's forfeiture is only possible after a full trial. At trial, the jury must find, beyond a reasonable doubt, that the property to be forfeited was connected to the illegal activity. *Pryba*, 674 F.Supp. at 1521.

In the same sense that a dollar fine presents no prior restraint problems, *Polykoff*, 816 F.2d at 1338, and 511 *Detroit St., Inc.*, 807 F.2d at 1298, the forfeiture of assets does not impermissibly hamper defendants' ability to

speak in the future.¹⁰ As above, a fine can lawfully be imposed in an amount far beyond a defendant's assets. Under RICO, and the companion tax charge in this indictment, the defendants face substantial fines. The possibility of dollar loss, then, will be present even in the absence of forfeiture. Any penalty, by fine or forfeiture, is imposed only after trial and not before. "Behind the distinction is a theory deeply etched in our law: a free society prefers to punish the few who abuse rights of speech *after* they break the law [rather] than to throttle them and all others beforehand." *Southeastern Promotions Ltd. v. Conrad*, 420 U.S. at 558-59, 95 S.Ct. at 1246-47

¹⁰ One cannot claim that the possibility of substantial fine or forfeiture is a deprivation of the right to speak freely:

this argument proves too much, since every civil and criminal remedy imposes some conceivable burden on First Amendment protected activities. One liable for a civil damages award has less money to spend on paid political announcements or to contribute to political causes, yet no one would suggest that such liability gives rise to a valid First Amendment claim. Cf. *Buckley v. Valeo*, 424 U.S. 1, 96 S.Ct. 612, 46 L.Ed.2d 659 (1975). Similarly, a thief who is sent to prison might complain that his First Amendment right to speak in public places has been infringed because of the confinement, but we have explicitly rejected a prisoner's claim to a prison environment least restrictive of his desire to speak to outsiders. See *Pell v. Procunier*, 417 U.S. 817, 94 S.Ct. 2800, 41 L.Ed.2d 495 (1974); see also *Jones v. North Carolina Prisoners Union*, 433 U.S. 119, 97 S.Ct. 2532, 53 L.Ed.2d 629 (1977).

Arcara v. Cloud Books, Inc., 478 U.S. 697, 699, 106 S.Ct. 3172, 3177, 92 L.Ed.2d 568 (1986).

(emphasis original). This policy is completely consistent with *Near* and its progeny.¹¹

Post conviction forfeiture necessarily deprives a defendant of assets garnered in the past. There is no necessary impact on expressive activity in the future. *American Library Association*, 713 F.Supp. at 486.

The fact that criminal punishment – whether it is by fine, incarceration, etc. – makes it physically difficult for the person to engage in First Amendment activity does not make the punishment unlawful “prior restraint,” as long as the person legally is unrestrained to engage in speech.

Id. at 486 n. 21. Deterrence is a goal of RICO, and forfeiture plays a role in that objective. This chill, if it is that at all, is a “legitimate consequence of the RICO forfeiture provisions or any other criminal penalty.” *Pryba*, 674 F.Supp. at 1512.

Defendants object to the RICO forfeiture penalties. In their view, obscenity simply cannot be made a crime without jeopardizing first amendment freedoms. Defendants confuse sincerity of belief with adherence to the rule of law. This way lies anarchy. The Supreme Court has held that obscenity may be criminalized consistent with our Constitution. *See, e.g., Ferber*, 458 U.S. at 764-65, 102 S.Ct. at 3358; *Smith v. United States*, 431 U.S. 291, 304-05, 97 S.Ct. 1756, 1765-66, 52 L.Ed.2d 324 (1977); *Miller*, 413

¹¹ “Liberty of speech and of the press is . . . not an absolute right, and the state may punish its abuse.” *Near v. Minnesota*, 283 U.S. 697, 708, 51 S.Ct. 625, 628, 75 L.Ed. 1357 (1931).

U.S. at 23-24, 93 S.Ct. at 2614-15. As such, this court, and the law, treats an obscenity charge the same as any other criminal charge, be it bank robbery, narcotics trafficking, or firearm violations. Were a defendant to be convicted of operating a drug ring out of a bookstore, the first amendment would not prevent seizure of that store, if the requisite nexus was proven. This Court will follow the law, and declines the invitation to strike RICO forfeiture provisions in an obscenity case as a prior restraint.

B. *As Applied Challenge*

The Court, therefore, concludes that, on its face, § 1963 forfeiture may be imposed, in an obscenity context, consistent with the Constitution. The actual forfeiture of property, however, has yet to take place. Defendants’ first line of defense is the jury. Until the jury renders its verdict, the Court will refrain from rendering a decision on this forfeiture, as applied.

Accordingly, the Court adopts the Report and Recommendation dated September 30, 1989, in all respects except parts 1, 2, 4, and 5. As to those parts, defendants’ motion to hold the forfeiture and restraining order provisions of 18 U.S.C. § 1963 unconstitutional is denied. Defendants’ motion to strike the Restraining Order of May 30, 1989, and the forfeiture provisions of the indictment is also denied.

The Court adopts in full the Report and Recommendation issued by the Honorable Patrick J. McNulty, dated November 29, 1989.

Having considered the magistrates' Reports and Recommendations, the Court now turns to Magistrate Symchych's Pretrial Order issued September 30, 1989. Defendants individually or collectively object to parts 4, 6, 9, and 12 of the order. The government objects to parts 4, 12, and 15.

Unlike a report and recommendation, a magistrate's order may be disturbed by this Court only upon a showing that the order was clearly erroneous or contrary to law. 28 U.S.C. § 636(b)(1)(A); Rule 72(a) Federal Rules of Civil Procedure; Local Rule 16(B)(2). Based upon a review of the record, with this standard in mind, the Court affirms the order dated September 30, 1989, except as to paragraph 12, and modifies paragraph 15 to clarify the government's responsibility.

In part 12 of her order, the magistrate granted defendants' motion for early disclosure of Jencks Act, 18 U.S.C. § 3500, materials, requiring such production "10 calendar days prior to trial." The Court finds the magistrate's order is contrary to law. 28 U.S.C. § 636(b)(1)(A); Rule 72(a), Federal Rules of Civil Procedure; Local Rule 16(B)(2).

Rule 16(a)(2), Federal Rules of Criminal Procedure, specifically excludes statements made by government witnesses from pretrial discovery, except as provided in the Jencks Act. The Jencks Act states in relevant part:

In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a Government witness or prospective Government witness (other than the defendant) shall be the subject of subpoena [sic], discovery, or

inspection until said witness has testified on direct examination in the trial of the case.

18 U.S.C. § 3500(a). This language has been interpreted according to its terms. Although the government may disclose Jencks Act material to a defendant in advance of trial, the government may not be required to do so. *United States v. White*, 750 F.2d 726, 728-29 (8th Cir.1984); see *United States v. Collins*, 652 F.2d 735, 738 (8th Cir.1981), cert. denied, 455 U.S. 906, 102 S.Ct. 1251, 71 L.Ed.2d 444 (1982).

This Court may not compel pretrial disclosure over government objection. *White*, 750 F.2d at 728-29; *United States v. Algie*, 667 F.2d 569, 571 (6th Cir.1982) (and cases cited therein); *United States v. Jones*, 678 F.Supp. 1302, 1303 (S.D.Ohio 1988); *United States v. Greater Syracuse Board of Realtors*, 438 F.Supp. 376, 383 (N.D.N.Y.1977). Part 12 of the order is reversed and defendants will receive Jencks Act materials as provided by law.

In part 15 of the Pretrial Order, the magistrate granted defendants' motion for disclosure of government agreements with witnesses. The government shall disclose said agreements on January 26, 1990. In all other regards, the Pretrial Order of September 30, 1989, is affirmed.

IT IS SO ORDERED.

APPENDIX A

Magistrate Symchych's Recommendations

September 30, 1989

1. Defendants' motion to find the forfeiture provisions of 18 U.S.C. § 1963, when applied to a prosecution based on predicate offenses of obscenity, to be unconstitutional under the First Amendment be GRANTED;

2. Defendants' motion to find the pretrial restraining order provisions of 18 U.S.C. § 1963, when applied to a prosecution based on predicate offenses of obscenity, to be unconstitutional under the First Amendment be GRANTED;

3. Defendants' motion to dismiss Counts VI, VII, and VIII of the indictment on the foregoing grounds be DENIED;

4. The forfeiture provisions of the indictment be dismissed with prejudice;

5. The pretrial restraining order presently in effect be vacated, and any sum expended by defendants for its monitoring be restored to them within thirty days hereof, or upon any order of the trial court sustaining this recommendation;

6. Defendants' motions to otherwise find the RICO statute, when applied to a prosecution based upon predicate offenses of obscenity, unconstitutional under the First Amendment be DENIED;

7. Defendants' motions to find the RICO statute, as applied to a prosecution based upon predicate offenses of

obscenity, to be unconstitutional in violation of the Ex Post Facto Clause be DENIED;

8. Defendants' motions to find the obscenity standard underlying the charged RICO predicate offenses and the offenses charged pursuant to 18 U.S.C. §§ 1465 and 1466, unconstitutional under the First Amendment be DENIED;

9. Defendants' motion to dismiss the indictment on grounds of equitable estoppel be DENIED;

10. Defendants' motion to dismiss the counts alleged under §§ 1465 and 1466 on grounds of temporal remoteness be DENIED;

11. Defendants' motion for leave to present an affirmative defense that he in good-faith mistakenly believed the materials in issue not to be obscene be DENIED;

12. Defendants' motion to dismiss Count I of the indictment on grounds of duplicity be DENIED;

13. Defendants' motion to dismiss Count I of the indictment on grounds of irreparable harm to the Sixth Amendment right to counsel and interference with the attorney-client privilege be DENIED;

14. Defendants' motion to dismiss Count I of the indictment on the grounds that it is properly chargeable only as a conspiracy to violate 26 U.S.C. § 7206(1) be DENIED;

15. Defendants' motion to dismiss the indictment on grounds of prosecutorial misconduct before the grand jury be DENIED;

16. Defendants' motion to suppress evidence obtained by search and seizure be, until such time as the matter is briefed and heard, TAKEN UNDER ADVISEMENT;

17. Defendants' motion to suppress statements, including the product of electronic surveillance, be DENIED; and

18. Defendants' motion to suppress trial testimony of witness Robert Milavetz be DENIED.

APPENDIX B

Magistrate Symchych's Order

September 30, 1989

1. Defendants' briefs regarding the motion to suppress evidence obtained by search and seizure shall be submitted to United States Magistrate Patrick McNulty, and served on the United States, no later than October 20, 1989, with no further leave for extension;

2. The government's responsive brief regarding the motion to suppress evidence obtained by search and seizure shall be submitted and served no later than October 27, 1989;

3. Hearing on the motion to suppress evidence obtained by search and seizure, including all testimony and argument, is set for 10:00 a.m., November 14, 1989, before United States Magistrate Patrick McNulty in Room 530 United States Courthouse at 110 South Fourth Street in Minneapolis, Minnesota. All counsel and parties shall be present;

4. Defendant Tigue's motion for severance and separate trial from the remaining defendants is granted;

5. Trial of the remaining defendants shall proceed prior to trial [sic] of defendant Tigue, to ensure that the trial of defendant Ferris Alexander, Sr. has concluded prior to any proposed use by defendant Tigue of materials deriving from their attorney-client relationship;

6. Defendants' motion to sever the tax-related counts of the indictment from the RICO and obscenity-related counts is DENIED;

7. Defendants' motions for severance from one another for trial, with the exception of defendant Tigue, are DENIED;

8. Defendants' motion for *James* hearing regarding Count I of the indictment is DENIED;

9. Defendants' motion for disclosure of grand jury materials is DENIED;

10. Defendants' motion for disclosure of confidential informers is DENIED;

11. Defendants' motion for a list of government witnesses is DENIED;

12. Defendants' motion for pretrial disclosure of Jencks Act materials, to the extent that the government shall produce said materials 10 calendar days prior to trial, is GRANTED;

13. Defendants' motion to require government agents to retain rough notes is GRANTED;

14. Defendants' motions for discovery of Rule 16 and exculpatory materials, to the extent they cover information within the scope of FRCrP 16 and *Brady v. Maryland* and its progeny, are GRANTED;

15. Defendants' motion for disclosure of government agreements with witnesses are GRANTED;

16. Defendants' motion for notice of intent to utilize 404(b) evidence is DENIED.;

17. Defendants' motion for a bill of particulars is DENIED;

18. Defendants' motions relating to jury selection, including the number of peremptory challenges, the degree of information to be disclosed regarding prospective [sic] jurors, and the method of voir dire, are RESERVED FOR THE TRIAL COURT.

APPENDIX C

Magistrate McNulty's Recommendations

November 29, 1989

1. That the Court enter an Order denying all motions by defendants for orders suppressing evidence.

2. That the Court enter an Order directing the United States Attorney to immediately destroy all copies of the magazine title *Freier Leben* and all of the material seized in execution of Search Warrant No. 88-553 as disclosed on the receipt attached thereto.

APPENDIX D

REPORT & RECOMMENDATION AND ORDER

The indictment in this matter, set forth in 79 pages and 43 separate counts, alleges a longstanding criminal obscenity racketeering enterprise, in violation of the federal RICO statute, a 20-year criminal conspiracy to defraud the United States by impairing and impeding the Internal Revenue Service, numerous substantive federal obscenity violations, and substantive tax violations. As gleaned from the face of the indictment, the government contends that defendant Ferris Alexander, Sr., has, for those 20 years, engaged in a livelihood of purveying pornographic materials, and in the course of doing so, has both concealed his identity and hidden the proceeds of that livelihood, all for criminal purposes. It alleges that the other defendants, in a variety of roles and times, have assisted him in that criminal conduct. The codefendants include his wife, son, bookkeeper, and attorney of some 15 years.

The defendants have filed a large number of pretrial motions, including serious constitutional challenges to the use of the RICO statute in conjunction with predicate offenses of obscenity, and other First Amendment impediments to the prosecution of this matter. Additionally, defendants challenge the conspiracy count of the indictment as pleaded, raise issues about the application of the attorney-client and spousal privileges in this case, challenge the propriety of the grand jury proceedings, and seek suppression of items seized pursuant to warrant. In addition, numerous discovery-related motions have been made; motions for severance of defendants and counts

are also pending. Other motions are also pending, and are resolved below.

PROCEDURAL HISTORY

Eighty-seven search warrants were authorized between May 9 and 11, 1988, by United States Magistrate Floyd Boline.¹ The United States grand jury sat on this matter from March, 1988, until May 30, 1989, when it returned its indictment. An *ex parte* post-indictment restraining order, pursuant to 18 U.S.C. § 1963(d)(1)(A), was entered that same date, and later amended on June 29, 1989. Defendants first appeared on May 31, 1989. Orders extending the pretrial and trial schedules were entered both on June 16, 1989 and August 9, 1989, after the case was designated as complex pursuant to the Speedy Trial Act, 18 U.S.C. § 3161(h)(8)(A). Pursuant to these scheduling orders, the parties were to file any and

¹ Following execution of the search warrants, Ferris Alexander filed a civil complaint in this court, seeking injunctive relief against the prosecution he contemplated. He did so on many of the same First Amendment challenges he now makes in this criminal case. *Alexander v. Thornburgh*, Civil 4-88-526. United States District Judge David S. Doty granted summary judgment for the Attorney General. 713 F.Supp. 1278 (D.Minn.1989). In so doing, he rejected many of Alexander's challenges, but did not rule on the constitutionality of RICO's post-conviction forfeiture provisions under the prior restraint doctrine. In addition, the court treated the challenges as facial ones, and did not have before it, the RICO/obscenity questions as applied to Alexander in the context of an actual criminal proceeding. The appeal from the summary judgment order was dismissed as moot on August 28, 1989, by the United States Court of Appeals for the Eighth Circuit.

all pretrial motions by July 28, 1989, with hearing set for August 8, 1989. Motions were filed by all defendants in accordance with that deadline, and each appeared with counsel for hearing on August 8, 1989, except defendant Tigue, who appeared *pro se*. Defendant Ferris Alexander was then represented by Douglas Thomson, Esq. and Neal Shapiro, Esq. Defendant Dolores Alexander was represented by Jack Nordby, Esq., of the firm of Meshbesher, Singer & Spence. Defendant Wanda Magnuson was represented by David Roston, Esq., and defendant Jeffrey Alexander was represented by Joseph Friedberg, Esq. The United States was represented by Assistant United States Attorneys Paul Murphy and Mary Carlson.

At the conclusion of the hearing on that date, it was ordered that the government submit, *in camera*, the transcripts of all grand jury proceedings in the matter. That has been accomplished, and those transcripts are in possession of the court. In addition, it was then ordered that by August 9, 1989, each defendant lodge with the court his or her itemized objections to the Tigue affidavit, previously filed on July 28, 1989. That affidavit was orally ordered to then be placed under seal, for review only by the court, as it may bear on disposition of pretrial motions. Defendants submitted those objections. The affidavit remains under seal. In addition, each defendant was ordered, by August 9, to submit an itemization of which motions he or she was joining, including itemization of which search warrants were objected to by each. The latter has not been done. Last, defendants' briefs were ordered to be submitted by August 21, 1989, and the government's by August 28, 1989. The court orally outlined issues required to be briefed, so that the parties'

specific legal arguments would be before the court. Those included all First Amendment issues, all search and seizure issues, including specific alleged defects in each warrant, all grand jury issues, privilege questions, and all severance matters. Oral argument on the matters briefed was set for September 6, 1989.

On August 16, 1989, counsel for defendants Ferris Alexander, Dolores Alexander, and Jeffrey Alexander moved to withdraw. On September 12, 1989, substitutions of counsel were filed by Robert Smith, Esq. and David Forro, Esq., for Ferris Alexander, and Michael McGlennen, Esq. for Dolores Alexander. Counsel for Jeffrey Alexander withdrew his motion to withdraw. A short period was allowed for new counsel to review the briefs submitted on behalf of their clients by prior counsel, and oral argument was set for September 25, 1989. Counsel assumed representation after an admonishment that the pretrial proceedings had been earlier extended on two occasions, and that generous periods had been allowed for consideration, preparation and filing of pretrial motions, and for trial preparation, and that further extensions were deemed unwarranted by the court. All agreed to assume representation under those circumstances.

Counsel for each of the defendants appeared on September 25, 1989 for oral argument, as did each defendant except Jeffrey Alexander. The court required of him a sworn written waiver of appearance, which must be filed. Defendant Tigue appeared *pro se*. Counsel for the government appeared. All parties made oral argument. In addition, defense counsel sought leave to file further memoranda of law and to make new challenges to the 87

search warrants, on the basis that earlier counsel had failed to do so.

In addition, there is pending the motion of the Minnesota Civil Liberties Union for leave to appear as amicus curiae regarding the indictment of and severance issues pertaining to defendant Tigue.

The court has before it the indictment, the 87 search warrants, the grand jury transcripts *in camera*, the transcript of proceedings before Senior United States District Judge Edward Devitt regarding Robert Milavetz *in camera*, the affidavit of defendant Tigue *in camera*, the testimony of record, and the briefs of the parties. The majority of the motions are susceptible of decision on the law, and on the face of the indictment. To the extent that findings of fact are necessary to the resolution of a motion, those findings are discussed in the relevant subpart of this Report and Recommendation.

I. FIRST AMENDMENT CHALLENGES

A. RICO

Defendants seek dismissal of Counts VI, VII and VIII of the indictment, as well as the forfeiture provision of the indictment on several First Amendment grounds. They allege that, as applied to predicate conduct consisting solely of obscenity offenses, RICO is unconstitutionally overbroad because it both chills presumptively protected First Amendment activity, and operates as a prior restraint on such activity. Defendants also expressly

challenge the pretrial restraining order and postconviction forfeiture provisions of RICO as a prior restraint in derogation of the First Amendment.²

As in *Fort Wayne Books, Inc.*, many of defendants' constitutional attacks on the indictment, including its RICO counts, more accurately implicate the validity of the federal obscenity laws, than they do RICO. To the extent that is the case, this court firmly recognizes, as discussed in the next subpart of this Report and Recommendation, that obscenity does not fall within the zone of constitutionally protected speech. In fact, it is legitimately subject to the criminal enforcement powers of the government. The focused question here, then, is whether the employment of obscenity predicates in the content of a

² Defendants have not filed any motion challenging the RICO statute, as applied to predicate conduct consisting solely of obscenity offenses, on the grounds of unconstitutional vagueness. In addressing that contention, in the context of a state RICO statute, the Supreme Court, in *Fort Wayne Books, Inc. v. Indiana*, 489 U.S. 46, 109 S.Ct. 916, 103 L.Ed.2d 34 (1989), cast it as "nothing less than an invitation to overturn *Miller v. California*, 413 U.S. 15, 93 S.Ct. 2607, 37 L.Ed.2d 419 (1973)] – an invitation that we reject." *Id.* 109 S.Ct. at 924. In so doing, the Court observed that the Indiana RICO statute closely tracked the federal statute, and that the holding may determine the constitutionality of use of obscenity as a predicate offense in federal RICO prosecutions. The Court reasoned that because the Indiana RICO law wholly incorporated a constitutional obscenity statute, that the vagueness challenge was without merit.

Aside from the potential vagueness challenge to the application of RICO to predicate offenses of obscenity, there has not been here, any challenge to the RICO statute itself or grounds of vagueness.

RICO prosecution unconstitutionally touches the exercise of separate and legitimate First Amendment activity. There is, in light of *Fort Wayne Books*, no longer a real question whether RICO may legitimately include the unprotected area of obscenity.

When the pretrial restraining order and post-conviction forfeiture provisions of RICO are examined with care, it becomes clear that this is a serious issue, of significant constitutional magnitude. Because such a pretrial restraining order is in place here, and because the forfeiture provisions are invoked in the indictment, it is appropriate to consider the problem both as it exists facially, on the statute, and in its application, to this case. Of course, well established principles of constitutional construction dictate that if a statute may be construed to be enforceable in a manner consistent with the Constitution, that it should not be struck down on its face. *United States v. Thirty-Seven Photographs*, 402 U.S. 363, 91 S.Ct. 1400, 28 L.Ed.2d 822 (1971); *Irving v. Clark*, 758 F.2d 1260, 1263 (8th Cir.1985), *aff'd*, 481 U.S. 704, 107 S.Ct. 2076, 95 L.Ed.2d 668 (1987); and *Turchick v. United States*, 561 F.2d 719, 723 (8th Cir.1977). The court is mindful that in reviewing a statute's facial validity, pre-existing constitutional requirements should be impliedly read into the words of the statute, when it is reasonably possible to do so. *Cf. New York v. Ferber*, 458 U.S. 747, 102 S.Ct. 3348, 73 L.Ed.2d 1113 (1982); *Time Inc. v. Hill*, 385 U.S. 374, 87 S.Ct. 534, 17 L.Ed.2d 456 (1967). Even with these precepts in the forefront, it is the conclusion of this court that the RICO pretrial restraining order and post-conviction forfeiture provisions, when employed with predicate offenses of obscenity, are both facially unconstitutional,

as well as unconstitutional in their application in this case. They are overbroad, and also constitute prior restraints of legitimate First Amendment activity.

This analysis must begin with a reaffirmation of the unflagging protection afforded by our Constitution to the robust exchange of ideas in our polity, and its avowed contribution to our national strength and diversity. *New York Times v. Sullivan*, 376 U.S. 254, 269-270, 84 S.Ct. 710, 720, 11 L.Ed.2d 686 (1964); *Garrison v. Louisiana*, 379 U.S. 64, 74-75, 85 S.Ct. 209, 215-216, 13 L.Ed.2d 125 (1964). The underpinnings of these First Amendment values are so potent as to result in a legal presumption that the exchange of ideas is constitutionally protected. This presumptive zone of First Amendment activity is well-established in our jurisprudence, and recently confirmed. *Roth v. United States*, 354 U.S. 476, 484, 77 S.Ct. 1304, 1309, 1 L.Ed.2d 1498 (1957); *Thornhill v. Alabama*, 310 U.S. 88, 101-02, 60 S.Ct. 736, 744, 84 L.Ed. 1093 (1940); *Whitney v. California*, 274 U.S. 357, 375, 47 S.Ct. 641, 648, 71 L.Ed. 1095 (1927) (Brandeis, J. joined by Holmes, J. concurring); *Abrams v. United States*, 250 U.S. 616, 630, 40 S.Ct. 17, 22, 63 L.Ed. 1173 (1919) (Holmes, J. dissenting); and *Fort Wayne Books, Inc.*, 109 S.Ct. at 929.

1. Overbreadth

Although a statute may legitimately exist to regulate and punish unprotected expressive activity, e.g. *New York Times*, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686; (libel), *Gertz v. Welch, Inc.*, 418 U.S. 323, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974); and *Drotzmanns, Inc. v. McGraw-Hill, Inc.*, 500 F.2d 830 (8th Cir.1974); ("fighting words"), *Chaplinsky v.*

New Hampshire, 315 U.S. 568, 571-572, 62 S.Ct. 766, 769, 86 L.Ed. 1031 (1942), and *Harisiades v. Shaughnessy*, 342 U.S. 580, 591-92, 72 S.Ct. 512, 520, 96 L.Ed. 586 (1952) (advocating violent overthrow of the government); *Hammond v. Adkisson*, 536 F.2d 237, 239 (8th Cir.1976); (obscenity), *Miller v. California*, 413 U.S. 15, 93 S.Ct. 2607, 37 L.Ed.2d 419 (1973); and *United States v. Freeman*, 808 F.2d 1290 (8th Cir.), cert. denied, 480 U.S. 922, 107 S.Ct. 1384, 94 L.Ed.2d 697 (1987), it may not, at the same time, reach out to touch or encompass these presumptively protected First Amendment activities. If it does, it is unconstitutionally overbroad. *Grayned v. City of Rockford*, 408 U.S. 104, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972); and *Upper Midwest Booksellers v. City of Minneapolis*, 780 F.2d 1389, 1391-92 (8th Cir.1985).

Defendants argue that the restraining order provisions and post-conviction forfeiture provisions of RICO do just that, when employed in an obscenity context. The Supreme Court did not address the constitutionality of the RICO forfeiture provisions in this context in *Fort Wayne Books, Inc.* because none of the cases then before it involved such a forfeiture. *Id.* 109 S.Ct. at 928 n. 11. Although it struck down, as a prior restraint, a pretrial seizure of three bookstores and their contents, the Court did not address the use of a restraining order, such as the one entered in this matter. In *Alexander v. Thornburgh*, the court did not reach the constitutionality of the forfeiture provisions under the prior restraint doctrine. 713 F.Supp. at 1294. It did uphold the facial validity of those provisions, however, against an overbreadth challenge. *Id.* at 1289.

The forfeiture provisions in issue here are set forth at 18 U.S.C. § 1963(a), (b), (c). Upon conviction, the sentencing court is mandated to order the statutory forfeiture, which is not limited to those assets tainted by the racketeering activity. Instead, the forfeiture applies to the defendant's entire interest in

- any enterprise which the person has established, operated, controlled, conducted, or participated in the conduct of, in violation of Section 1962; and (18 U.S.C. § 1963(a)(2))
- any property constituting, or derived from, any proceeds which the person obtained, directly or indirectly, from racketeering activity . . . in violation of Section 1962. (18 U.S.C. § 1963(a)(3)).

The parties here, and the courts reviewing these forfeiture provisions, have commonly understood them to include business and property of the convicted person, even if a portion of that business or property entails or is attributable to legitimate business operations. Eg. *United States v. Busher*, 817 F.2d 1409 (9th Cir.1987); and *Alexander v. Thornburgh*, 713 F.Supp. at 1289. The legislative history squares with this view, and evinces a congressional intent to attack racketeering at its economic roots through the mandatory forfeiture clause. A line of cases, including *Alexander*, and *United States v. Pryba*, 674 F.Supp. 1504 (E.D.Va.1987), concludes that a penalty provision, such as a fine or forfeiture, is not constitutionally constricted by the amount received by a defendant in connection with the specific activity for which he was convicted. A fine, for instance, may extend in the court's discretion, to an amount commensurate both to his ability to pay and to

serve some deterrent value. In upholding the forfeiture provision on this rationale, the court in *Thornburgh* noted that "if plaintiff's argument were accepted, it would seemingly invalidate any penalty provision . . . in an amount that is not tied to the profits earned from the sale of obscene materials. . . ." 713 F.Supp. at 1289. *Polykoff v. Collins*, 816 F.2d 1326 (9th Cir.1987), and *511 Detroit Street, Inc. v. Kelley*, 807 F.2d 1293 (6th Cir.1986), cert. denied, 482 U.S. 928, 107 S.Ct. 3211, 96 L.Ed.2d 698 (1987), follow the same rationale in upholding fines imposed against book-sellers for obscenity violations.

The imposition of a fine is a fundamentally distinct punishment from the forfeiture of an entire business or enterprise, as is contemplated by § 1963. When the businesses, enterprises, or properties contemplated within § 1963 are engaged in a mixture of lawful distribution of expressive materials and obscenity, the statute quite clearly contemplates wholesale forfeiture, including the lawful portion. the all-encompassing statutory language seems emphatic in this regard. If the asset is "derived from . . . directly or indirectly", the proceeds of racketeering, it is forfeitable under § 1963(a)(3). *Western Business Systems, Inc. v. Slaton*, 492 F.Supp. 513 (N.D.Ga.1980) (forfeiture applies to any chattel including books or movies which are seized not because of their contents but because they were realized through or derived from crime). On its face, the statute could encompass the forfeiture of major national bookstore chains in the event that a jury in one judicial district found it to be engaged in the multiple sales of, for example, a given obscene magazine in a single locale, in violation of the racketeering laws. Likewise, under § 1963(a)(2), if a convicted

racketeer "participated in" any enterprise in violation of § 1962, the entire interest held by him in that enterprise is forfeitable, even if it, in some proportion, involves mainstream, lawful dissemination of expressive materials. In *Fort Wayne Books, Inc.*, 109 S.Ct. at 928, the Court, in dicta, stated that for purposes of deciding that case, but without deciding the issue, it assumed that bookstores and their contents are forfeitable when it is proved they are "used in or derived from" obscenity racketeering activity. The Supreme Court clearly did not decide the issue, and articulated an assumption far more narrow than the forfeiture provisions of § 1963. Because the forfeiture provisions of § 1963 contemplate, wholesale forfeiture without regard to consequences to the exercise of protected expressive acts, it must be concluded that in the context of RICO/obscenity prosecution, the forfeiture provisions of § 1963 are impermissibly overbroad on their face, and may not be employed. Likewise, as measured against a reading of the indictment in this case, which sets forth a claim for forfeiture including multiple bookstores, theatres, and videotape rental establishments, the forfeiture provisions, as applied, are unconstitutionally overbroad.

The overbreadth of the forfeiture provisions, however, should not result in a dismissal of the RICO counts of the indictment. Because they amount to only one of several available criminal penalties should there be a conviction, the prosecution under the RICO counts can properly go forward without the availability of the forfeiture remedy. *United States v. Marubeni America Corp.*, 611 F.2d 763, 769-70 (9th Cir.1980) (court dismissed forfeiture derived from single count which alleged violation of 18

U.S.C. § 1962(c) and noted that such was not only effective penalty against corporate racketeers).

It is, therefore, recommended that defendants' motion to find the forfeiture provisions of 18 U.S.C. § 1963, when employed in a case involving predicate offenses of obscenity, to be unconstitutionally overbroad both on their face and as applied, be granted. It is, however, recommended that the motion to dismiss Counts VI, VII and VIII of the indictment on this basis be denied.

The provision permitting the entry of a pretrial restraining order, 18 U.S.C. § 1963(d)(1), suffers from overbreadth for the same reasons set forth above. The only purpose of the restraining order provision is to enable the post-conviction forfeiture. The statute makes clear that such an order is issuable "to preserve the availability of property . . . for forfeiture under this section." The Supreme Court in strong language struck down the pretrial seizure of the three bookstores in *Fort Wayne Books, Inc.*, finding it to constitute a prior restraint. It is clear that any system of prior restraint carries a strong presumption of unconstitutionality. *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70, 83 S.Ct. 631, 639, 9 L.Ed.2d 584 (1963). The "risk of prior restraint" existing with the statutory vehicle for such pretrial seizures, was sufficient to strike down the order in *Fort Wayne Books, Inc.*, 109 S.Ct. at 927-28.

The facts there, however, involved the wholesale seizure of three bookstores and their contents resulting in the interruption of sales of presumptively protected books and films. *Id.* at 929. The precedent cited by the

Court involved holdings which turned on the actual removal of expressive materials from circulation. *New York v. P.J. Video, Inc.*, 475 U.S. 868, 106 S.Ct. 1610, 89 L.Ed.2d 871 (1986); and *Heller v. New York*, 413 U.S. 483, 93 S.Ct. 2789, 37 L.Ed.2d 745 (1973).

The restraining order here is wholly unlike the pre-trial seizure order in *Fort Wayne Books, Inc.* It expressly authorizes the continuation of all business activity by each of the entities identified in the forfeiture pleadings. It has been amended to allow the sale of one of those entities as authorized by a local court. It essentially limits defendants only in terms of the transfer of title to any of the entities. It was issued *ex parte*, and under seal, along with the filing of the indictment, on May 30, 1989. It was issued much in the manner of a search warrant, upon an affidavit showing of probable cause by the case agent. Encompassing 32 pages, the order applies to each of the defendants, to some 48 "controlled entities," and the accounts of the defendants and entities at 14 specified financial institutions. It also orders counsel for defendants and "other persons acting for or in concert with" the defendants or entities to comply with its terms. The overall prohibition of the restraining order is against alienation, transfer, sale or dissipation of the capital assets. It imposes recordkeeping requirements, specifying documentation necessary for transactions included within the ordinary course of business. The order defines the ordinary course of business to include, among other things, payment for inventory and supplies, ordinary use of equipment and supplies, and other things. The order

also provides for government monitoring of the operations of the "controlled entities", to guard against dissipation and waste. The monitoring requires the review of books and records, and is to be compensated for by defendants. The order provides defendants with the alternative of a performance bond, in an amount to be set, if they elect that option. The order is entered at docket #6.

This quite clearly constitutes a substantial governmental intrusion into ongoing businesses which are apparently engaged in distribution of expressive materials. Without any prior adversarial hearing, or any adjudication that this activity is wholly within the unprotected zone of obscenity, this restraining order suffers from the same overbreadth problem as does the forfeiture clause. *Quantity of Copies of Books v. State of Kansas*, 378 U.S. 205, 84 S.Ct. 1723, 12 L.Ed.2d 809 (1964), and *Heller*, 413 U.S. at 492, 93 S.Ct. at 2794. In fact, from the time of the indictment until the time of trial, this restraining order has and will have more direct effect on that part of the businesses engaged in presumptively protected distribution than will the forfeiture pleadings.

For these reasons, the availability of a pretrial restraining order under § 1963(d) is facially unconstitutional overbroad in a RICO prosecution predicated upon underlying obscenity offenses. In this case, the existing restraining order is likewise impermissibly overbroad. It is therefore recommended that the motion to find them so be granted, and that the restraining order be vacated, with a return to defendants of all sums thus far expended in honoring the terms of that order. *Cf. Thornburgh*, 713 F.Supp. at 1293, where the court suggests that a

performance bond requirement could serve as a constitutional means of preserving forfeitable assets in the case of a bookseller charged in a RICO/obscenity case.

2. Prior Restraint

These same two provisions are alleged to violate the First Amendment as an unconstitutional prior restraint. The prior restraint doctrine has, as its chief function, the guaranty of prevention of previous restraints on publication or dissemination of expressive matters. *Near v. Minnesota*, 283 U.S. 697, 713, 51 S.Ct. 625, 630, 75 L.Ed. 1357 (1931). In *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 559, 96 S.Ct. 2791, 2803, 49 L.Ed.2d 683 (1976), the Court stated that prior restraints are the most serious and intolerable of infringements on First Amendment rights. They come to the Court with a heavy presumption weighing against them. *Bantam Books, Inc. v. Sullivan*, 372 U.S. at 70, 83 S.Ct. at 639. In *Near's* early pronouncement of the doctrine, the Supreme Court drew a clear line between unlawful prior censorship, and post-publication punishment imposed following legal process. The former is in violation of the First Amendment, and the latter is not. 283 U.S. at 714, 51 S.Ct. at 630.

The government here argues that the forfeiture provision falls into the latter category, and is employed only after the substantial judicial safeguards inherent in a criminal prosecution have been satisfied. It argues, based on *Fort Wayne Books, Inc.*, that some degree of resultant self-censorship, is not enough to invalidate a penalty provision imposed by past obscenity related conduct. In passing on the propriety of using obscenity offenses as

predicate acts under RICO, the Court acknowledged that the stiff RICO penalties might act as a deterrent "and cause some cautious booksellers to practice self-censorship and remove First Amendment protected materials from their shelves." *Fort Wayne Books, Inc.*, 109 S.Ct. at 925. The Court observes it to be a practical reality that criminal obscenity statutes will inhibit the dissemination of some materials which are not obscene. The RICO forfeiture provision, however, involves more than the mere threat of self-censorship because it authorizes the seizure and removal from the stream of commerce businesses actually involved in protected expressive acts that have not been a subject of a prior criminal conviction. The Court expressly stated in a footnote, that it was not, in *Fort Wayne Books, Inc.*, passing upon the issue of RICO forfeiture provisions as a prior restraint. *Id.* at 928 n. 11. In leading to this footnote, the Court quoted the Indiana Court as stating that the Indiana RICO forfeiture provision "is intended not to restrain the future distribution of presumptively protected speech but rather to disgorge assets acquired through racketeering activity." *Id.* at 928.

If that were truly the substance and the effect (*Near*, 283 U.S. at 708-09, 51 S.Ct. at 628) of § 1963(a)(2) and (3), it would be simple to conclude that RICO's forfeiture provisions do not constitute a prior restraint. However, as discussed above, the forfeiture statutes are broadly drawn and designed to result in forfeiture of the entire property interests of the convicted racketeer, even if that interest may in large part be derived from lawful sources. In the case of bookstores, theaters, and movie distribution enterprises, it may well be the case that the forfeiture involves substantial inventories of actual protected

expressive materials, as well as those presumptively protected until adjudicated otherwise. The forfeiture statute is drawn without any proportionality of this mix in mind, and was in fact enacted prior to the addition in 1984, by Congress, of obscenity as an additional predicate offense. There is no statutory provision confining the forfeiture penalty solely to the disgorgement of assets acquired through racketeering activity, as the Indiana Court discussed. To the extent that businesses engaged primarily in the legitimate distribution of expressive nonobscene materials are forfeitable, as a penalty for obscenity racketeering, it is difficult to see how such a forfeiture does not constitute a prior restraint, *J-R Distributors, Inc. v. Eikenberry*, 725 F.2d 482 (9th Cir.1984), *rev'd on other grounds, sub nom Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 105 S.Ct. 2794, 86 L.Ed.2d 394 (1985).

A penalty provision implicating the ongoing business of presumptively protected activities must be more narrowly drawn in order to avoid that consequence. *City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 800 n. 19, 104 S.Ct. 2118, 2126 n. 19, 80 L.Ed.2d 772 (1984) ("[w]here the statute unquestionably attaches sanctions to protected conduct, the likelihood that the statute will deter that conduct is ordinarily sufficiently great to justify an overbreadth attack"). *Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620, 637, 100 S.Ct. 826, 836, 63 L.Ed.2d 73 (1980); *Buckley v. Valeo*, 424 U.S. 1, 25, 96 S.Ct. 612, 637, 46 L.Ed.2d 659 (1976); *N.A.A.C.P. v. Button*, 371 U.S. 415, 433, 439, 83 S.Ct. 328, 338, 340, 9 L.Ed.2d 405 (1963); *Cantwell v. Connecticut*, 310 U.S. 296, 311, 60 S.Ct. 900, 906, 84 L.Ed. 1213 (1940).

In numerous instances, federal courts have struck down overly broad penalties for obscenity convictions as an impermissible prior restraint. Eg. *City of Paducah v. Investment Entertainment, Inc.*, 791 F.2d 463 (6th Cir.), *cert. denied*, 479 U.S. 915, 107 S.Ct. 316, 93 L.Ed.2d 290 (1986); *Gayety Theatres, Inc. v. City of Miami*, 719 F.2d 1550 (11th Cir.1983); *Entertainment Concepts Inc., Ill v. Maciejewski*, 631 F.2d 497 (7th Cir.1980), *cert. denied*, 450 U.S. 919, 101 S.Ct. 1366, 67 L.Ed.2d 346 (1981); *Genusa v. City of Peoria*, 619 F.2d 1203 (7th Cir.1980); *Universal Amusement Co., Inc. v. Vance*, 587 F.2d 159 (5th Cir.1978), *aff'd on other grounds*, 445 U.S. 308, 100 S.Ct. 1156, 63 L.Ed.2d 413 (1980); and *Cornflower Entertainment, Inc. v. Salt Lake City Corp.*, 485 F.Supp. 777 (D.Utah 1980). The language of the *Cornflower* court is typical of the holdings of these cases, that the penalties were not in fact imposed for past abuses, and instead amounted to prior restraints: "To reason that an involuntary closure of a motion picture theater for past obscenity violations does not constitute a prior restraint is clearly contrary to the Supreme Court's definition of prior restraint." 485 F.Supp. at 786. Likewise, the forfeiture contemplated here, of entire businesses engaged in the distribution of books, magazines, and movies, is an overly broad penalty even for obscenity racketeering, and therefore constitutes a prior restraint of those entities.

It is, therefore, recommended that RICO's forfeiture provisions, when employed in a prosecution having predicate obscenity offenses be held facially unconstitutional as prior restraints. It is recommended, however, that the motion to dismiss the RICO counts on that basis be denied.

Likewise, the pretrial restraining order provision of RICO, in the context of a RICO/obscenity prosecution, is unconstitutional on its face as a prior restraint. *Fort Wayne Books, Inc.* has expressly so held in the instance of a pretrial seizure of three bookstores in a RICO/obscenity prosecution. 109 S.Ct. at 927. In observing that thousands of books and films were taken out of circulation by the pretrial seizure, the Court stated that without an adversarial hearing in which the presumption of First Amendment protection was overcome, the prior-restraint doctrine was violated.

The issuance of a restraining order, even if it allows the business to carry on in its usual course, is not sufficiently constitutionally distinct to escape this holding. Such a restraining order, as is evident from the one in place here, puts entire businesses into the class of "controlled entities," enjoins dissipation of their assets, imposes recordkeeping requirements, and most significantly, requires the oversight of the businesses by the same entities involved in the pending prosecution of the matter. It is self evident that these restrictions constitute such a significant degree of government involvement in the operations of protected First Amendment activities as to be the equivalent of unconstitutional censorship. "The way in which a restraint on speech is 'characterized' . . . is of little consequence" for purposes of prior restraint analysis. *Near*, 283 U.S. at 720-21, 51 S.Ct. at 632-633, cited in *Fort Wayne Books Inc.*, 109 S.Ct. at 929.

The ongoing court-ordered intrusion of the government is sure to chill the involvement of suppliers, customers, employees and other third persons doing a day-to-day business with these "controlled entities", whose

every transaction is subject to the eye of an agent also involved in the racketeering prosecution of those entities.

For these reasons, the restraining order provisions of the RICO statute, when applied in a case involving obscenity predicates, and as embodied in docket #6 herein, amount to unconstitutional prior restraints. They should be vacated here, but the RICO counts should nonetheless survive, for the reasons discussed above.

3. *Ex-Post Facto Prohibition*

The Ex Post Facto doctrine prohibits the criminalization of an act performed prior to the passage of the relevant criminal proscription. *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 1 L.Ed. 648 (1798). Defendants argue that because the RICO counts of the indictment allege a racketeering enterprise from 1969 on, and because obscenity was added only in 1984 as a permissible predicate offense, that this prosecution impermissibly criminalizes conduct occurring before 1984. They argue that because the First Amendment presumptively protected all expressive activity for RICO purposes prior to 1984, that the charge of an obscenity racketeering enterprise prior to that date cannot be sustained.

The argument is not persuasive. As the government urges, Congress gave fair warning on the face of the RICO statute that those who had committed a predicate act prior to its enactment, could be properly prosecutable under its provisions upon the commission of an additional single predicate act. This argument has been repeatedly sustained against attacks under the Ex Post

Facto prohibition. *United States v. Brown*, 555 F.2d 407 (5th Cir. 1977), *cert. denied*, 435 U.S. 904, 98 S.Ct. 1448, 55 L.Ed.2d 494 (1978); *United States v. Campanale*, 518 F.2d 352 (9th Cir.1975), *cert. denied*, 423 U.S. 1050, 96 S.Ct. 777, 46 L.Ed.2d 638 (1976); and *United States v. Pryba*, 674 F.Supp. 1504 (E.D.Va.1987).

Because constitutional federal state and obscenity statute existed prior to the 1984 legislation which added obscenity as a predicate act, the foregoing precedent sustains the government claim that a portion of the predicate conduct or proof of racketeering may nonetheless predate the 1984 legislation.

The motion to dismiss the RICO counts as violative of the Ex Post Facto clause should be denied.

B. OBSCENITY COUNTS

1. Constitutionality of Obscenity Standard

Counts 6 through 42 of the indictment charge defendants Ferris J. Alexander, Sr., Dolores Alexander, Jeffrey Alexander and Wanda Magnuson with substantive violations of the federal obscenity laws. 18 U.S.C. §§ 1465 and 1466. Defendants seek dismissal of those counts, inviting the trial court to reexamine the constitutional validity of the Supreme Court's obscenity standard in *Miller v. California*, 413 U.S. 15, 93 S.Ct. 2607, 37 L.Ed.2d 419 (1973). They complain that the standard is overbroad, exceeding the legitimate governmental interest of protecting minors, unwilling adults, and neighborhoods; is so constitutionally vague that it inhibits free speech and violates due process; is lacking in a meaningful scienter element; and

in combination with the enhanced RICO penalties, improperly chills free speech.

The *Miller* standard has been repeatedly addressed, and upheld, by the Supreme Court. *Smith v. United States*, 431 U.S. 291, 97 S.Ct. 1756, 52 L.Ed.2d 324 (1977); and *Hamling v. United States*, 418 U.S. 87, 94 S.Ct. 2887, 41 L.Ed.2d 590 (1974). The Court just this year refused any invitation to reexamine the *Miller* standard in *Fort Wayne Books, Inc.* Accordingly, all lower courts, including this one, are bound by it. The law of the land quite plainly is that obscene expression, as defined by the three-part *Miller* test, falls outside First Amendment protection, and is punishable under the criminal law.

No more need be said.

2. Viability of § 1466

This statutory provision, enacted in November, 1988, makes it a federal offense to engage in the business of selling or transferring obscene matter. Paragraph (b) of the statute contains a rebuttal presumption that

the offering of or to transfer, at one time, two or more copies of any obscene publication, or two or more of any obscene article, or a combined total of five or more such publications and articles

amounts to engaging in the business, as proscribed under paragraph (a). The penalty for this offense is enhanced from the penalty for conviction under § 1465.

Counts 32 through 42 charge defendants, with the exception of defendant Tigues, under § 1466. They challenge the constitutionality of the statute both on vagueness grounds, and on the grounds that the presumption violates due process of law within the meaning of *Leary v. United States*, 395 U.S. 6, 89 S.Ct. 1532, 23 L.Ed.2d 57 (1969) as well as the burden of proof requirement, as proscribed by *Sandstrom v. Montana*, 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979).

The alleged vagueness of the obscenity standard is disposed of in the preceding section, and the alleged vagueness of the terms "engaged in the business" and "receiving" does not rise to the level required for a statute to be constitutionally infirm on that basis. The plain language of the statute, coupled with the scienter element of the offense is sufficient to put a reasonable person on notice of what the statute proscribes.

The presumption, which is rebuttable, as set forth, clearly meets the due process test that "the presumed fact must be more likely than not to flow from the proven fact on which it is made to depend." *Leary*, 395 U.S. at 36, 89 S.Ct. at 1548. The presumption, in fact is derived from and almost identical to that in § 1465, and upheld after challenge in *United States v. Manarite*, 448 F.2d 583 (2d Cir.) cert. denied, 404 U.S. 947, 92 S.Ct. 281, 285, 287, 298, 30 L.Ed.2d 264 (1971).

Accordingly, defendants' motions for dismissal of the counts based on 18 U.S.C. § 1466 should be denied.

3. Equitable Estoppel

Defendants argue that this prosecution is a "sudden, unexpected, and unwarranted reactivation of prosecution" of obscenity matters by the federal authorities, which must be foreclosed on the grounds of equitable estoppel. They claim that because defendant Ferris Alexander has not been prosecuted by the federal authorities for 17 years, that he has come to rely in his business dealings on some sort of governmental acquiescence in the non-obscene nature of his business dealings. He argues, in part, that he has construed this non-prosecution as a conformity of his books and movies with the "contemporary community standards" of the *Miller* test. They contend, secondly, and as part of this theory, that they were constitutionally entitled to some fair warning on the part of the government, that it regarded these materials as obscene, before prosecution could properly go forward. Thirdly, as part of this theory, they argue that these defendants have been improperly segregated out for prosecution on federal obscenity grounds, and that this selectivity in their prosecution is fatal.

Each of these arguments is rejected, and the court concludes that whether characterized as "equitable estoppel" or an aspect of "due process", the government cannot properly be foreclosed from proceeding for these reasons.

Defendants' reliance on the equitable estoppel theory derives from *Watkins v. United States Army*, 875 F.2d 699 (9th Cir.1989) (*en banc*). The case involved a claim for injunctive relief against the Army regarding qualifications for enlistment. No case has been cited to the court

involving an equitable estoppel in a criminal prosecution. In fact, authority exists for the proposition that it is inapplicable in a criminal matter. *United States v. Anderson*, 637 F.Supp. 1106 (D.Conn.1986). There has been no showing of any affirmative representation by any government official having authority to do so, indicating that defendant's conduct was non-prosecutable, or that the government would not prosecute it. Cf. *United States v. Bruscantini*, 761 F.2d 640 (11th Cir.), cert. denied, 474 U.S. 904, 106 S.Ct. 271, 88 L.Ed.2d 233 (1985).

The government's recitation of the published opinions regarding obscenity in the federal reporters during recent years is probative that federal prosecutions have indeed occurred. Moreover, the enactment of RICO, and the 1984 amendment adding obscenity as a predicate offense, were clear indicators, long before 1989, that Congress regarded trafficking in obscenity as a serious criminal offense. There is no requirement, other than the clarity of the language in the statute involved, that a defendant be forewarned of the possibility of prosecution before a charge may be brought. As the Court stated in *Fort Wayne Books, Inc.*, the Supreme Court has never required the prosecution to "fire warning shots." 109 S.Ct. at 926.

Defendants have not met their threshold heavy burden in pursuing the claim of selective prosecution. *United States v. Catlett*, 584 F.2d 864 (8th Cir.1978). Without doing so, they are not entitled to further hearing to inquire into the motives behind the prosecution. Based upon the indictment's contents and the other information before the court in this matter, it appears that the prosecution is well within the bounds of fair prosecutorial discretion.

Cf. *United States v. Hazel*, 696 F.2d 473 (6th Cir.1983); *United States v. Rice*, 659 F.2d 524 (5th Cir.1981); and *Catlett*, 584 F.2d 864.

Consequently, the motion to dismiss on grounds of equitable estoppel should be denied.

4. Temporal Remoteness

Defendants also challenge the obscenity related counts, seeking their dismissal, on the argument that the dates of the charged offenses are too remote to be fairly judged by jurors according to the constitutional *Miller* test of "contemporary community standards." They claim also that young jurors are generally more favorable to them, and that those who were young at the time of the alleged offenses are not now so young, and as a corollary, that jurors who are now 18 are not competent to sit in judgment of contemporary community standards as they existed in 1984-1988. They also assert that they are deprived of obtaining viable surveys regarding community reaction to specific books or movies, because community standards may now differ from what they were at the time of the offenses.

These clearly are not the type of reasons warranting the remedy of dismissal. A defendant in a criminal case is entitled to a fair jury, selected from a fair cross section of the community. *Taylor v. Louisiana*, 419 U.S. 522, 95 S.Ct. 692, 42 L.Ed.2d 690 (1975). He is not entitled, as such, to have any given class, race, or gender seated on his jury. The serious question of selective, discriminatory removal of certain groups of jurors, is not presented in this case.

Cf. Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986). The acknowledged fluidity of contemporary community standards in the case law – see *McKinney v. Alabama*, 424 U.S. 669, 96 S.Ct. 1189, 47 L.Ed.2d 387 (1976), does not require the prosecution of an obscenity case to occur in the same year as the offense date.

There is no merit to defendant's analogy of the preindictment delay cases where dismissal may flow from inordinate preindictment delay, utilized by the prosecution for its tactical advantage, and to the prejudice of the defendant. *United States v. Lovasco*, 431 U.S. 783, 97 S.Ct. 2044, 52 L.Ed.2d 752 (1977). Moreover, the requisite elements required for dismissal on those grounds have not been demonstrated here.

The charges should not be dismissed for temporal remoteness.

5. Affirmative Defense

Defendant Ferris Alexander seeks a pretrial order granting him the right to prevent an affirmative defense that he was in good-faith mistaken whether the materials upon which the obscenity-related charges are based fell within the *Miller* three-part test. The predicate for the motion is the composite of defendants' arguments challenging the *Miller* test. Especially, as respects this motion, defendant carries on his claim that *Miller* and its progeny fail to include a constitutionally adequate scienter, or *mens rea*, requirement. As articulated by the Supreme Court in *Hamling v. United States*, 418 U.S. 87, at 123, 94 S.Ct. 2887, 2910, 41 L.Ed.2d 590 (1974), the government

must prove that a defendant charged with obscenity "knew the contents, nature, and character of the materials." The Court has expressly held that the government need not prove defendant knew the materials to be obscene.

To permit defendant to go forward with his affirmative defense, as proposed, would have the effect of nullifying the Supreme Court's *mens rea* standard in obscenity matters.

Accordingly, the Motion should be denied.

II. THE CONSPIRACY COUNT

Count I of the indictment is the only count in which each of the defendants is charged along with all the others. It is the only count in which defendant Tigue is charged. It alleges that from 1969 until the return of the indictment, the defendants conspired to defraud the United States, in violation of 18 U.S.C. § 371, "by impeding, impairing, obstructing and defeating the lawful governmental functions of the Internal Revenue Service" by concealing the amounts and deposits of income, the true ownership, control, management and operation of, and sources of funds used to acquire and expand Alexander's businesses. The charge is a so-called *Klein* conspiracy, in which the alleged objective is to defraud the United States by obstructing the IRS in its duties of identifying and collecting taxable income. *United States v. Klein*, 247 F.2d 908 (2nd Cir.1957).

Defendants seek the dismissal of this count on a variety of grounds, as well as severance from one another

on this count. The arguments include a claim that the count is improperly duplicitous because it in fact charges multiple conspiracies, that it is brought in derogation of the Sixth Amendment right to counsel and attorney-client privileges, that a more specific available statute exists causing the broad-scale conspiracy to be improperly charged, and that a *James* hearing is necessary before the count may proceed to trial. Each of these arguments is without merit insofar as dismissal is sought. With respect to severance, however, the claims regarding attorney-client privilege are meritorious, and will result in the severance of defendant Tigie for trial.

1. Duplicity

Defendants argue that Count I fails to charge a single conspiracy and that, on its face, it demonstrates the charging of at least two, and as many as eight, separate conspiracies. If that is indeed the case, the indictment is duplicitous on its face, and carries the potential harm that a defendant will be unable to determine on a verdict form if he has been found guilty of all those conspiracies, or some combination of a few, or only one. The pleading of former jeopardy to a later like charge then becomes problematic. It is true that these are the evils to be protected against when an indictment is duplicitous. *Kotteakos v. United States*, 328 U.S. 750, 66 S.Ct. 1239, 90 L.Ed. 1557 (1954) and *United States v. Snider*, 720 F.2d 985 (8th Cir.1983), *cert. denied*, 465 U.S. 1107, 104 S.Ct. 1613, 80 L.Ed.2d 142 (1984).

Defendants have proffered facts and schematic charts to explicate their argument that multiple conspiracies are

charged. The government, at pages 5-11 of its brief on the subject, makes a proffer of how the charged conspiracy is a single conspiracy. These opposing theories as to the conspiracy count are entirely dependent upon proof at trial of their underlying assertions, and, in short, amount to "trial of the general issue" within the meaning of Fed.R.Crim.P. 12(b). For that reason, they are not, at the pretrial motions stage of the proceeding, an appropriate means of resolving the duplicity question. For this timing reason alone, in order to leave resolution of the factual contentions to a determination by a jury, the motion should be denied at this stage. *United States v. Shortt Accountancy Corp.*, 785 F.2d 1448, 1452 (9th Cir.), *cert. denied*, 478 U.S. 1007, 106 S.Ct. 3301, 92 L.Ed.2d 715 (1986); and *United States v. Williams*, 644 F.2d 950, 952 (2nd Cir.1981).

An examination of Count I, as pleaded, however, fails to reveal a facial defect in terms of duplicity. A single objective is pleaded at the outset, namely a joint effort to defraud the United States by means of conducting Ferris Alexander's businesses in such a manner as to impede and impair the IRS. It does not defeat the pleading of this single conspiratorial objective that multiple discrete groups of participants or projects exist. *United States v. Peyro*, 786 F.2d 826, at 829 (8th Cir.1986); *Snider*, 720 F.2d at 988. The lesser participation of one defendant, or his participation of one defendant, or his participation in only one facet of a multi-faceted conspiracy, does not warrant the conclusion that an indictment is defective for the improper allegation of multiple conspiracies in a single count. *United States v. Lee*, 782 F.2d 133, 135 (8th Cir.1986); *United States v. Massa*, 740 F.2d 629, 636 (8th

Cir.1984), *cert. denied*, 471 U.S. 1115, 105 S.Ct. 2357, 86 L.Ed.2d 258 (1985); and *United States v. Warner*, 690 F.2d 545, 549 (6th Cir.1982).

Complex conspiracies, involving multiple parties designated to fulfill multiple subsidiary functions may be properly charged in a single count, even if the allegation involves activities over a protracted period. The linchpin for such a charge to be properly pleaded is the existence of a single common objective. *United States v. Richerson*, 833 F.2d 1147, 1153 (5th Cir.1987). See also, *United States v. Napue*, 834 F.2d 1311 (7th Cir.1987), and *United States v. Standard Drywall Corp.*, 617 F.Supp. 1283, at 1299 (E.D.N.Y.1985).

As is clear from much of the precedent on this question of duplicitously pleaded conspiracies, the question most often is incapable of full resolution until after the jury verdict when the jury has been instructed regarding the singular objective requirement and has decided whether or not it has been sustained. Eg. *United States v. Bledsoe*, 674 F.2d 647 (8th Cir.1982), and *United States v. Coward*, 630 F.2d 229 (4th Cir.1980).

Because the motion to dismiss on grounds of duplicity should be denied, defendants' argument that the separate multiple conspiracies are barred under the statute of limitations also falls. With a properly pleaded single conspiracy in Count I, the limitations period is measured from the date of the last overt act set forth in the count. *Fiswick v. United States*, 329 U.S. 211, 216, 67 S.Ct. 224, 227, 91 L.Ed. 196 (1946); *Buford v. Tremayne*, 747 F.2d 445, 448 (8th Cir.1984); *White v. Bloom*, 621 F.2d 276 (8th Cir.1980), *cert. denied*, 449 U.S. 1089, 101 S.Ct. 882, 66 L.Ed.2d 816

(1981). Because that last overt act is alleged to have occurred on November 3, 1988, and because the indictment was returned within five years of that date, there is no violation of the applicable statute of limitations in Count I. 18 U.S.C. § 3282.

2. Sixth Amendment Right to Counsel and Attorney-Client Privilege

Defendants' motion to dismiss on these grounds is put to the court in strong terms, including allegations of deliberate prosecutorial misconduct. Fact findings are necessary to examination and disposition of the issue. Based upon the testimony of defendant Tigue, the continuing assertion of attorney-client privilege by defendant Ferris Alexander, the sealed Tigue affidavit, and the grand jury transcripts, the following facts are determined:

Defendant Tigue is a licensed attorney, admitted to practice in a number of courts, including this federal court and the state courts of Minnesota. He has handled a significant amount of First Amendment and obscenity litigation, and is likely to be regarded by members of the bar as a specialist in those areas. Defendant Tigue has continually represented defendant Ferris Alexander from 1974 until the date of this indictment, with only a short hiatus of nonrepresentation around 1981. He has represented defendant Ferris Alexander in those 15 years on some 50 different matters, including litigation, business negotiations, and real estate transactions. It appears that during such representation he has served as an attorney, rather than as a business

advisor, scrivener, partner, or in some other capacity. During those representations, privileged communications presumptively and, in fact, occurred. Defendant Tigie has from time to time, represented each of the other codefendants. During the course of those representations, privileged communications presumptively occurred.

Defendant Tigie has represented defendant Ferris Alexander during the investigative stage of this prosecution, beginning that representation in May 1988, upon execution of the search warrants issued by United States magistrate Floyd Boline. That representation continued until the return of the indictment, in which they were both named as defendants.

During the course of the representation regarding the defense of this case, privileged communications presumptively and, in fact, occurred. Those communications involved legal advice regarding past conduct which was the subject of the contemplated charges. During the months between May 1988 and May, 1989, legal and factual strategies for the defense of the contemplated charges were discussed and formulated.

At no time before the return of the indictment did defendant Tigie or defendant Ferris Alexander become aware that the former may be charged in this matter.

As of June 17, 1988, when defendant Tigie filed a civil complaint seeking injunctive relief as to this investigation, the individual prosecutors in this case became aware of defendant Tigie's representation of defendant Ferris Alexander relating to this criminal investigation. *Alexander v. Thornburgh*, 713 F.Supp. 1278. By his continual

involvement in that matter, including argument on summary judgment motions in November, 1988, and prosecution of an appeal to the Eighth Circuit, they were individually aware of the continuation of that representation well into May, 1989.

A grand jury subpoena was issued to defendant Tigie sometime before November 21, 1988, on which date he appeared and testified before the grand jury. No questions were asked of him as to his potential criminal liability in this matter, and nothing led him to believe he was a subject of the investigation.

Defendant Tigie intends, in his defense of this matter, to invoke his right under Rule 1.6(b)(4) of the Minnesota Rules of Professional Conduct, to disclose privileged communications of defendants.

Defendant Ferris Alexander intends to and has invoked the protection of the attorney-client privilege.

Defendant Ferris Alexander intended to hire defendant Tigie for, and defendant Tigie had in fact performed work as lead counsel on the obscenity aspects of any forthcoming indictment.

Defendants seek dismissal as a result of these circumstances, with defendant Ferris Alexander arguing that the government has deliberately interfered with his Sixth Amendment right to counsel and that it has engaged in deliberate prosecutorial misconduct during this sequence of events. He argues also for the dismissal of charges against his codefendant Tigie, as the only available means of preserving the privileged material between him

and his former attorney. He urges that it is through the government's actions, and through the fault of no one else, that an attorney-client relationship was allowed to develop on the defense of this very matter up to and including the date of indictment.

In response, the government argues that rules of grand jury secrecy preclude the disclosure of who may or may not be indicted in a given case, and that no prospective defendant is entitled to a so-called target warning. It claims that its conduct is not to be faulted, and that the communications between defendants Tigie and Ferris Alexander are not privileged due to the crime-fraud exception to the attorney-client privilege. They urge that an examination of the charge in the indictment and the grand jury materials allows such a ruling prior to trial. Even without such a pretrial ruling, the government argues that the communications would constitute inadmissible hearsay, and that as a consequence, these two defendants should remain joined as coconspirators, and that dismissal should be denied.

Absent some showing of actual prejudice, an indictment is not dismissible on the grounds asserted here. *United States v. Morrison*, 449 U.S. 361, 367, 101 S.Ct. 665, 669, 66 L.Ed.2d 564 (1981). The case is quite squarely on point, involving a deliberate intrusion through a codefendant/informant into the attorney-client relationship of a charged defendant. The Court of Appeals had found a Sixth Amendment violation and held that the indictment should be dismissed with prejudice. The Supreme Court reversed on the remedy, holding that in the absence of a showing that representation at trial was impaired, dismissal was not proper. It cited numerous cases in which

counsel had been interfered with, but no dismissal awarded. Eg. *Gideon v. Wainwright*, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963); *Powell v. Alabama*, 287 U.S. 45, 53 S.Ct. 55, 77 L.Ed. 158 (1932); and *O'Brien v. United States*, 386 U.S. 345, 87 S.Ct. 1158, 18 L.Ed.2d 94 (1967). It observed that the remedy for these, and other constitutional infractions under the Fourth and Fifth Amendments, has been suppression of tainted evidence.

In this case, no tainted evidence has been procured by the government, and if it somehow is forthcoming, it can be suppressed by the trial court. Because the constitutional right to the assistance of counsel does not include an absolute right to one's choice of counsel, and because defendant Ferris Alexander is now represented by seemingly experienced, competent counsel in the subject area, there is no showing of the type of prejudice which should call for dismissal.

This leaves the question about the potential disclosure by defendant Tigie of communications as to which defendant Ferris Alexander has asserted a claim of attorney-client privilege. As noted above, defendant Tigie has stated his intent to invoke the rules of ethics which allow his use of privileged materials in order to defend himself. He cannot be deprived of matter deemed material to his defense without intrusion into his constitutional right of self defense. *Rock v. Arkansas*, 483 U.S. 44, 107 S.Ct. 2704, 97 L.Ed.2d 37 (1987). The government's contention that such communications would constitute inadmissible hearsay are not well-founded, especially in light of the record here. It establishes that defendant Tigie's use of these privileged communications would go to the question of his intent, or purpose, in committing

the acts charged against him in Count I. He has more than once offered to stipulate to the majority of those allegations, and to go to trial on the intent issue. That being the main dispute then, between the government and defendant Tigie, it appears that defendant Alexander's communications are likely to fall into the state-of-mind exception to the hearsay rule. Rule 803(3) of the Federal Rules of Evidence. Under like circumstances, such statements have been admitted over a hearsay objection. *United States v. Partyka*, 561 F.2d 118 (8th Cir.1977), cert. denied, 434 U.S. 1037, 98 S.Ct. 773, 54 L.Ed.2d 785 (1978); *United States v. Taglione*, 546 F.2d 194 (5th Cir.1977).

This leaves then the application of the crime-fraud exception, and the remaining question of severance. If it is the case that the crime-fraud exception swallows the entirety of the communications in issue here, it would seem that a joint conspiracy trial is in order, as the government urges. The Supreme Court has just recently treated relevant facets of the crime-fraud exception. *United States v. Zolin*, ___ U.S. ___, 109 S.Ct. 2619, 105 L.Ed.2d 469 (1989). There, the Court reiterated the well-accepted delineating of past versus future wrongdoing, and the application of the privilege. "The . . . privilege must necessarily protect the confidences of wrongdoers, but the reason for that protection - ceas[es] to operate at a certain point, namely, where the desired advice refers *not to prior wrongdoing*, but to *future wrongdoing*." 109 S.Ct. at 2626, citing 8 Wigmore, § 2298, p. 573 (emphasis original). Defendants persuasively argue, and the fact record amply supports, the position that defendant Tigie's representation of Ferris Alexander during the investigation phase of

this criminal matter is unarguably outside the crime-fraud exception, because the investigation and charges deal with past wrongs. *In Re Murphy*, 560 F.2d 326, at 337 (8th Cir.1977). Whatever privileged discussions relating to the charged offense in Count I arose between May, 1988 and the date of the indictment, then, relates to past wrongdoing. As a result, the government cannot demonstrate a *prima facie* showing that the communications were engaged in for the express purpose of the commission of ongoing or future crime. *Pritchard-Keang Nam Corp. v. Jaworski*, 751 F.2d 277 (8th Cir.1984); and *In Re Berkley and Co.*, 629 F.2d 548 (8th Cir.1980).

With respect to the attorney-client communications predating representation on this matter, the court observes that they would have occurred coterminously with the conduct alleged in Count I to be conspiratorial and criminal. Because there is no fair and clear way to separate out which aspects of the privilege may be overridden at trial by the crime-fraud exception, and because defendant Tigie begins trial, under *Rock v. Arkansas* and the rules of professional conduct, with the right to employ those communications in his defense, it would be inappropriate to require a joint trial of these two defendants. Either or both is so likely to suffer some prejudicial consequence, that the interests of fair trial and long-run judicial economy require a severance of defendant Tigie for trial on Count I of the indictment. If the remaining defendants are first tried on the conspiracy count, there is no possibility that defendant Tigie's attempts to have privileged statements admitted in his defense will impair any of defendant Ferris Alexander's trial rights.

Accordingly, dismissal should not be granted as a remedy for this motion, but severance of defendant Tigue for trial is ordered.³

3. Improper Offense Charged

Defendant Ferris Alexander argues for dismissal of Count I on the grounds that the indictment cannot properly charge a *Klein* conspiracy in view of the availability of a conspiracy to violate 26 U.S.C. § 7206(1). That statute prohibits the filing of a false tax return, making it a felony to do so.

This motion is readily disposed of by a reading of Count I and its allegations, and by considering the argument of the government that the conspiracy count charges far more than an unlawful agreement to file false returns. It is in fact alleged as part of the conspiracy that there were periods where no returns were filed, and that complicated transactions and entities were established to avoid defendant Alexander's obligation to file. The conduct alleged is indeed far more pervasive, and sounds in fraud, rather than the more narrow offending conduct necessary to proof of the offense of § 7206(1).

³ The court has, in addressing the issues in this motion, reviewed the brief submitted by the Minnesota Civil Liberties Union as *amicus curiae*. It has found, however, that the issues were more fully developed and related to relevant facts by the briefs of the parties. It has also, over the objection of defendants, considered the grand jury transcripts *in camera* in conjunction with the issue of the crime-fraud exception. *Zolin*, 109 S.Ct. at 2630.

Dismissal on this basis should be denied.

4. James Hearing

The Fifth Circuit Court of Appeals in *United States v. James*, 590 F.2d 575, cert. denied, 442 U.S. 917, 99 S.Ct. 2836, 61 L.Ed.2d 283 (1979), established a procedure prerequisite to the offering of coconspirator statements by the government at trial. Defendants seek an order that such a preliminary adjudication of the admissibility of coconspirators statements be made in this case, prior to trial.

This Circuit has squarely rejected this approach. *Llach v. United States*, 739 F.2d 1322 (8th Cir.1984); and *United States v. Bell*, 573 F.2d 1040 (8th Cir.1978). In fact, the subsequent history of *James* itself has recognized the onerous and repetitive nature of any requirement that a conspiracy case be presented in a minitrial to the court before actually being tried to the jury. It has, as a result, been modified to establish an order of proof for trial, instead. *Id.* at 578. Moreover, the Supreme court, in *Bourjaily v. United States*, 483 U.S. 171, 107 S.Ct. 2775, 97 L.Ed.2d 144 (1987), has allowed trial courts to consider the contents of coconspirator statements themselves in making preliminary determinations under Rule 801(d)(2)(E) of the Federal Rules of Evidence.

No such pretrial "*James*" hearing will be granted here.

III. GRAND JURY MATTERS

Defendants, especially defendant Tigue, urge the court to dismiss the indictment due to a pattern of fatal

irregularities in the grand jury proceedings in this matter. The challenges include a claim of prosecutorial misconduct in interfering with the independence and deliberations of the grand jury, as well as claims that the grand jurors were erroneously instructed in the law by virtue of omissions regarding the First Amendment, and the failure of the prosecutors to present exculpatory evidence. The defendants seek disclosure of the grand jury transcripts in order to further develop this basis for dismissal. To the extent that any *in camera* review has been conducted without disclosure of the same materials to defendants, they object.

The government has supplied *in camera* a full transcript of the grand jury proceedings, including witness testimony, dialogue between jurors and prosecutors, and instructions of the law. It has also certified that the transcript is a complete one of all proceedings in this matter. After a review of the *in camera* materials and considerations of the parties' legal arguments, along with the presumption of regularity attached to grand jury proceedings - *United States v. Mechanik*, 475 U.S. 66, 106 S.Ct. 938, 89 L.Ed.2d 50 (1986), and *Costello v. United States*, 350 U.S. 359, 76 S.Ct. 406, 100 L.Ed. 397 (1956) - the court concludes that this group of motions is without merit and should be denied.

The prosecutor may not engage in fundamentally unfair tactics or mislead a jury. *United States v. Lame*, 716 F.2d 515 (8th Cir.1983). To the extent that such misconduct occurs before a grand jury, it may constitute a basis for dismissal of an indictment. Manifestly improper conduct may justify that remedy. See *United States v. Babb*, 807 F.2d 272 (1st Cir.1986). However, before misconduct may

serve as the predicate for dismissal, it must be established that the independence of the grand jury, in making its decision to indict, was thereby tainted. *Bank of Nova Scotia v. United States*, 487 U.S. 250, 108 S.Ct. 2369, 101 L.Ed.2d 228 (1988); and *United States v. Hintzman*, 806 F.2d 840 (8th Cir.1986). Although the primary challenges to the indictment in *Bank of Nova Scotia* arose in the context of violations of grand jury procedure, the indictment was also challenged on the basis of an alleged constitutional violation. 108 S.Ct. at 2376. Thus the test of taint on the independence of the grand jury applies equally to allegations of constitutional infractions. E.g. *United States v. Benjamin*, 852 F.2d 413, 420 (9th Cir.1988) (no prosecutorial misconduct warranting dismissal of indictment where prosecutor's questions consistently elicited Fifth Amendment responses); *United States v. Talbot*, 825 F.2d 991, 998 (6th Cir.1987), *cert. denied*, 484 U.S. 1042, 108 S.Ct. 773, 98 L.Ed.2d 860 (1988) (dismissal of indictment for alleged constitutional violation warranted only upon demonstration of prejudice); see also *United States v. Zanger*, 848 F.2d 923, 925 (8th Cir.1988) (no dismissal of indictment warranted for prosecutor's failure to instruct jury on obscenity standard). Accordingly, then, only if there is grave doubt that the decision to indict was free from such violations is dismissal in order. *Bank of Nova Scotia*, 108 S.Ct. at 2374. As discussed above, even misconduct of constitutional proportion does not ordinarily call for dismissal, *Morrison*, and suppression of evidence or some other lesser remedy should be ordered.

Defendant Tigue presented testimony that his secretary received an anonymous call from a person representing himself to be a grand juror. The call was received on

July 10, 1989, after the filing of the indictment. The caller related that when he had expressed serious question about rendering an indictment against defendant Tigue, that Assistant United States Attorney Paul Murphy had told him to "shut up." In conjunction with the prosecutor's alleged failure to provide proper instruction on the law and to present exculpatory evidence, defendant Tigue urges the court to conclude that there was misconduct preventing an independent decision on his indictment.

Rule 6(e)(1) of the Federal Rules of Criminal Procedure requires that all proceedings before the grand jury, except for deliberation and vote, be stenographically recorded. The *in camera* submissions and certification attending it of completeness, demonstrate that such transcription occurred in this case. Nowhere in the numerous dialogues between the prosecutor and grand jurors is there anything which nearly resembles the conversation attributed to the anonymous caller. There is no credible basis of record upon which to conclude that the caller was in fact a grand juror, or that the alleged conversation ever occurred. The transcripts justify the conclusion that this claim is without foundation, and that therefore there is no further particularized need for disclosure of the grand jury proceedings. *Beatrice Foods Co. v. United States*, 312 F.2d 29 (8th Cir.1963).

With this core allegation found to be unsubstantiated, the totality of alleged misconduct disintegrates into several lesser unrelated, and common attacks on grand jury proceedings. First is the claim, disposed of above in the discussion of the conspiracy count, that neither defendant Tigue nor defendant Ferris Alexander was forewarned of the former's impending indictment, or status as a subject

of the investigation. As discussed above, the severance remedy appropriately ameliorates the difficulties generated by that circumstance, and dismissal is not warranted even if a wrong were somehow committed in that regard.⁴

With regard to the adequacy of instructions on the law, as presented to the grand jury, defendants focus largely on omission of the first Amendment doctrines of the right of pseudonymity and anonymity as set forth in *Talley v. California*, 362 U.S. 60, 80 S.Ct. 536, 4 L.Ed.2d 559 (1960) and its progeny. The *in camera* submissions contain transcription of the instructions provided to the grand jury, and upon review, the court observes that they include the essential elements of each offense contained in the indictment, and elaboration as to several matters within those elements. There is, as such, no erroneous or misleading instruction. The omission of instructions as to expected defenses does not fatally infect the grand jury proceeding or the indictment. *Lopez v. Riley*, 865 F.2d 30 (2nd Cir.1989); *United States v. Lincoln*, 630 F.2d 1313 (8th Cir.1980); *United States v. Camp*, 541 F.2d 737 (8th

⁴ While the government contends that no putative defendant is legally entitled to a so-called "target warning." *United States v. Washington*, 431 U.S. 181, 97 S.Ct. 1814, 52 L.Ed.2d 238 (1977); *United States v. Burke*, 781 F.2d 1234 (7th Cir.1985), it is the court's view that the type of disclosure urged by defendants would have avoided the ensuing complications in this prosecution. That could have been accomplished early in the grand jury proceedings either by a motion to disqualify defendant Tigue as counsel, or by motion for relief from grand jury secrecy pursuant to Fed.R.Crim.P. 6 (e)(3)(C). At any rate, resolution of that subissue is not essential to disposition of the motion.

Cir.1976). Moreover, the *in camera* review and indictment make it clear that the government contends that Count I is supported by probable cause as to the motive or purpose of the conspiracy. If defendant Tigie contends that another contrary purpose defeats the *mens rea* element, that is for him to present at trial, should he so choose. For now, however, the question of the accuracy of the law, as it was presented to the grand jurors, centers on probable cause for indictment. *Costello*, 350 U.S. 359, 76 S.Ct. at 406. It is clear that the facts presented to the grand jurors and the instructions of law properly focused their attentions in that regard.

Last is the question of presentation of evidence which defendants contend is exculpatory, and their claim that omission of this evidence fatally misled the grand jury. Well-established precedent makes it clear that there is no obligation on the part of the prosecutor to present the target's explanation for the conduct in issue. *United States v. Civella*, 666 F.2d 1122 (8th Cir.1981). *Accord United States v. Ismaili*, 828 F.2d 153 (3rd Cir.1987), *cert. denied*, 485 U.S. 935, 108 S.Ct. 1110, 99 L.Ed.2d 271 (1988); *United States v. Wilson*, 798 F.2d 509 (1st Cir.1986); and *United States v. North*, 708 F.Supp.370 (D.C.1988). In this matter, it is clear on this record that the allegedly exculpatory material is indeed the essence of the defense in the case. Whether it carries the day will be determined as it should, by the empaneled petit jury. It is not so evidently exculpatory that it defeats the probable cause underlying the indictment, or gives rise to any prosecutorial obligation to present it to the grand jury.

Under these circumstances, there is not a demonstrated, particularized need to breach the legal secrecy

accorded grand jury matters, as required in *Douglas Oil Co. v. Petrol Stops Northwest*, 441 U.S. 211, 99 S.Ct. 1667, 60 L.Ed.2d 156 (1979), and *In re Disclosure of Testimony Before the Grand Jury*, 580 F.2d 281 (8th Cir.1978).

As a consequence, defendants' motions relating to grand jury proceedings should be denied.

IV. SUPPRESSION MOTIONS

The most substantial suppression question here involves Fourth Amendment issues regarding the multiple search warrants, and the large volumes of evidence seized in their execution. Although those warrants have been available for examination and copying by defense counsel since the time of indictment, and although the court ordered briefing on the particularized defects alleged about the warrants and on standing to challenge the warrants, all that is now before the court is a boilerplate motion to suppress, boilerplate motions to join the motions of codefendants, and the government's argument that the motions should be denied because defendants have, for all intents and purposes, not gone forward despite ample time and the court's warnings. Defendants' counsel represent to the court that in the confusion of substitution of counsel, which occurred during the briefing schedule, these briefs were not prepared. Despite a hesitation to reopen the pretrial motions stage of this matter, suppression of evidence seized by warrant is too fundamental a motion to resolve by the equivalent of default. Accordingly, a new briefing schedule and hearing date will be established for those issues alone.

The remaining suppression dispute deals with tape recorded conversations obtained by the government, involving various of the defendants. None of the conversations involved custodial interrogation, and each was the result of consensual monitoring by one of the participants in the conversation. Consequently, there is no basis for suppression of the contents of any of those tapes. *Hoffa v. United States*, 385 U.S. 293, 87 S.Ct. 408, 17 L.Ed.2d 374 (1966); *Lopez v. United States*, 373 U.S. 427, 83 S.Ct. 1381, 10 L.Ed.2d 462 (1963); *United States v. Craig*, 573 F.2d 455 (7th Cir.1977), cert. denied, 439 U.S. 820, 99 S.Ct. 82, 83, 58 L.Ed.2d 110 (1978); and *United States v. McMillan*, 508 F.2d 101 (8th Cir.1974), cert. denied, 421 U.S. 916, 95 S.Ct.1577, 43 L.Ed.2d 782 (1975).

No other confessions or statements were provided by any of the defendants to any law enforcement agent.

In sum then, disposition of the motion to suppress evidence obtained by search and seizure is reserved until further briefing and hearing, the motion to suppress the consensually recorded conversations should be denied, and the remainder of the suppression motions denied as moot on the government's representation that no other confessions or statement to law enforcement officers were made.

V. SUPPRESSION OF MILAVETZ TESTIMONY

Defendant Ferris Alexander seeks suppression of the testimony at trial of witness Robert Milavetz. The basis for the motion is an assertion of the attorney-client privilege. The issues are must akin to those arising in terms of

defendant Tigue's potential testimony regarding his attorney-client relationship with defendant Ferris Alexander. Witness Milavetz preceded defendant Tigue as counsel for Ferris Alexander, and served in that role for a period of years, representing Ferris Alexander much as defendant Tigue, in litigation, business negotiations, and real estate transactions. The government opposes the motion, again asserting the crime-fraud exception to the privilege, and claiming waiver of the privilege.

The court has reviewed *in camera* both the grand jury testimony of witness Milavetz, and the transcript, briefings, and Order of Senior United States District Judge Edward Devitt in connection with those grand jury proceedings. This review has been made over defendant's objection to the court's examination of these underlying materials. Under *United States v. Zolin*, ___ U.S. ___, 109 S.Ct. 2619, 105 L.Ed.2d 469 (1989), and *Beatrice Foods Co. v. United States*, 312 F.2d 29 (8th Cir.1963), the Court deemed the review to be both necessary and proper.

As part of Judge Devitt's order, he determined that defendant Ferris Alexander had waived any claim of privilege to the testimony of Milavetz, because he had had fair notice of the proceedings before Judge Devitt, set for March 3, 1989, and failed to appear to assert his privilege. With knowledge that this was an initial step in procuring evidence for a serious criminal prosecution, this failure to appear can be construed in no other meaningful manner other than the waiver which Judge Devitt found. In comparison to potential testimony of defendant

Tigue, efforts have been repeatedly made to assert the privilege.⁵

Although Judge Devitt's ruling of waiver and this court's agreement with it is strong medicine as to arguably privileged materials, it is the necessary result. It makes unnecessary any resolution of the arguments regarding the crime-fraud exception. However, this court observes that Judge Devitt did apply the crime-fraud exception to the entirety of the Milavetz testimony in his March, 1989, order and this court sees no reason in the submissions to depart from that order. It notes, however, a distinction with respect to defendant Tigie on this question, arising from defendant Tigie's unique role as counsel regarding this very matter from May, 1988 until the return of the indictment. Even if the crime-fraud exception is found to apply in some degree with respect to defendant Tigie's attorney relationship, that finding does not thereby justify an abrogation of the privilege as to all dealings between the two, as attorney and client. *United States v. Valencia*, 541 F.2d 618 (6th Cir.1976).

For these reasons, the motion to suppress the Milavetz testimony should be denied.

⁵ This is so despite the government's contention of waiver regarding the Tigie affidavit. Defendant had no forewarning of the filing of the affidavit, and adequately prompt measures were taken to enter objection to and provide for sealing of the affidavit. The court declines to find waiver of the privilege regarding defendant Tigie.

VI. SEVERANCE - OF DEFENDANTS AND COUNTS

The severance motions are numerous in this case, and encompass claims of improper joinder of defendants and counts under the rules of criminal procedure, prejudicial joinder arising from various privilege claims, resultant unavailability of codefendants as witnesses, inconsistent defenses, disparity of evidence admissible against defendants in terms of the relative scope of their involvement, spillover effect, and prejudicial impact of the obscenity related counts on the tax-related counts.

Defendant Tigie's arguments regarding severance need no further discussion because the privilege issues arising from his joint indictment with his client have been found to warrant his severance from the other defendants.

It is most logical to determine if the entire indictment, *sans* defendant Tigie, may and should properly be tried in a single case, before resolving the questions regarding severance of defendants. In resolving the joinder of counts in an indictment, the court should not entertain a mini-trial on the charges, with opposing evidence offered by the parties as to the propriety of joinder. Instead, the allegations on the face of the indictment should be determinative of the joinder of counts. *United States v. Massa*, 740 F.2d 629 (8th Cir.1984), *cert. denied*, 471 U.S. 1115, 105 S.Ct. 2357, 86 L.Ed.2d 258 (1985); and *United States v. Cook*, 99 F.R.D. 252 (E.D.Tenn.1982).

A facial reading of the indictment provides a compelling basis for concluding that the charges arise from a series of acts and transactions "connected together or constituting parts of a common scheme or plan."

Fed.R.Crim.P. 8(a). There is, on the face of the indictment, an integration and dependence of the counts. As the government asserts, the fluid identities of business forms and involvement of various persons charged in Count I under the *Klein* conspiracy, is the functional equivalent of the enterprise charged in Counts VI, VII and VIII under the RICO statute. Likewise, the "business" charged in the counts under 18 U.S.C. § 1466 is conterminous with the preceding conspiracy and RICO elements. The substantive wrongful activity alleged to be undertaken by defendants in those various business forms is claimed in the indictment to be directed at the singular purpose of trafficking in illegally obscene materials without detection and financial obligation to the taxing authorities. As a consequence, the substantive tax and obscenity counts are integral to, and constitute partial proof of the other charges. This unity or commonality of the various counts sustains their joinder in a single indictment. *Schaffer v. United States*, 362 U.S. 511, 514, 80 S.Ct. 945, 947, 4 L.Ed.2d 921 (1960); *United States v. Patterson*, 819 F.2d 1495 (9th Cir.1987); *United States v. Bibby*, 752 F.2d 1116 (6th Cir.), cert. denied, 475 U.S. 1010, 106 S.Ct. 1183, 89 L.Ed.2d 300 (1985); and *United States v. Phillips*, 664 F.2d 971 (5th Cir.), cert. denied, 457 U.S. 1136, 102 S.Ct. 2965, 73 L.Ed.2d 1354 (1981). Likewise, the self-evident commonality of proof on these charges makes their joint trial the preferable alternative. *United States v. Garcia*, 785 F.2d 214, 220 (8th Cir.), cert. denied 475 U.S. 1143, 106 S.Ct. 1797, 90 L.Ed.2d 342 (1986); and *United States v. Brim*, 630 F.2d 1307 (8th Cir.1980). This is so in spite of any argument that the obscenity related proof may so offend jurors that

they will be unable to separately and independently consider the tax-related charges. Because the obscenity-related charges are so integral to the conspiracy count and its factual context, this argument for severance is not well taken. *United States v. Garcia*, 785 F.2d at 220 (8th Cir.) (proof relevant to charges against one defendant interwoven with proof relevant to another defendant but no indication that jury was confused).

For these reasons then, the counts of the indictment should be tried together in a single trial. Whether any of the defendants should be separately tried on the group of charges against him or her is the next step in the severance analysis.

The initial question is the propriety of joinder under Fed.R.Crim.P. 8(b). The rule specifies that all defendants need not be charged in all counts, and may be joined in an indictment when they are alleged to have participated in "the same series of acts or transactions." As discussed above, the charged offenses do constitute such a connected series. The alleged involvement on the face of the indictment of each of the defendants (aside from defendant Tigie, who is charged in only one count), sufficiently demonstrates the connection of each in this series of transactions that the joinder of defendants is proper. *Bibby*, 752 F.2d 1116. When viewed in conjunction with the rule that coconspirators should be tried in a single trial. *United States v. Arenal*, 768 F.2d 263 (8th Cir.1985); and *United States v. DeLuna*, 762 F.2d 897 (8th Cir.), cert. denied, 474 U.S. 980, 106 S.Ct. 382, 88 L.Ed.2d 336 (1985), it appears that the motions for severance of defendants should be denied.

Before reaching that conclusion, defendants' claims of prejudicial joinder made pursuant to FRCrP 14 must be taken up. The relative complexity of this indictment, and the variance in the roles of each of the defendants does not stand in the way of a joint trial. Here, the number of defendants is relatively small, and their relationship to the charged offenses relatively discrete. The complexity of the charges themselves will continue whether the trials are joint or several. The ability of a jury to compartmentalize defendants and proof is not seriously in question here. *Eg. DeLuna*, 763 F.2d at 919; and *United States v. Miller*, 725 F.2d 462 (8th Cir.1984). Similarly, the comparatively greater weight of the evidence against some defendants, or the greater alleged involvement by some, does not call for severance even if the jury has heard and considered such evidence. *United States v. Robinson*, 774 F.2d 261, 267 (8th Cir.1985); and *United States v. Boyd*, 610 F.2d 521, 525 (8th Cir.1979), *cert. denied*, 444 U.S. 1089, 100 S.Ct. 1052, 62 L.Ed.2d 777 (1980). Nor does the admissibility of evidence against some but not others. *Robinson*, 774 F.2d at 267. *United States v. Reeves*, 674 F.2d 739, 746 (8th Cir.1982).

Because there are no post-conspiracy statements involved as proof in this case (see discussion of suppression motions above), the sometimes difficult severance issues arising in terms of *Bruton v. United States*, 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968), are not present here.

The remaining issues also do not change the conclusion that a joint trial of all defendants should be had, with the exception of defendant Tigie. Although there are claims that a joint trial may deprive some defendants

of the testimony of codefendants, the requisite showing has not been made to sustain a severance on this basis. Prerequisite to such a remedy, a defendant must present actual proof that a given codefendant has committed himself to testify, and that the testimony is exculpatory and material to the defense. *United States v. Garcia*, 785 F.2d 214; and *United States v. Starr*, 584 F.2d 235, 238 (8th Cir.1978).

Likewise, the claims of potentially antagonistic defenses are not adequately of record to call for severance. It has not been demonstrated that for a jury to believe one defense, it will necessarily have to disbelieve another. *United States v. Massa*, 740 F.2d 629; *United States v. Kaminski*, 692 F.2d 505 (8th Cir.1982). Defendant Dolores Alexander's contention that she knew nothing of the affairs of the businesses set forth in the indictment does no more than portray a defense of ignorance. There is nothing demonstrated about the inconsistency of her lack of knowledge with any defense to be asserted by other codefendants.

Last, are the claims by both Ferris and Dolores Alexander that their spousal privilege requires their severance for trial. As elucidated by the Supreme Court in *Trammel v. United States*, 445 U.S. 40, 100 S.Ct. 906, 63 L.Ed.2d 186 (1980), the privilege has two distinct components: the privilege against testifying over one's objection, against one's spouse; and the separate privilege protecting communications during the course of the marriage. The Supreme Court has clearly held a spouse who chooses to do so, may testify despite the nonwaiver of the privileges by the opposing spouse.

The government claims that it has made a sufficient *prima facie* showing of the crime-fraud exception to the spousal privilege for a holding that it has been overcome. It urges therefore that severance on this basis should be denied. A review of the application of the crime-fraud exception to the spousal privilege shows it to have been applied and upheld in the majority of circuits that have been confronted with the question. *United States v. Picciandra*, 788 F.2d 39 (1st Cir.), *cert. denied*, 479 U.S. 847, 107 S.Ct. 166, 93 L.Ed.2d 104 (1986); *United States v. Estes*, 793 F.2d 465 (2nd Cir.1986); *United States v. Ammar*, 714 F.2d 238 (3rd Cir.1983); *United States v. Broome*, 732 F.2d 363 (4th Cir.), *cert. denied*, 469 U.S. 855, 105 S.Ct. 181, 83 L.Ed.2d 116 (1984); *United States v. Mendoza*, 574 F.2d 1373 (5th Cir.), *cert. denied*, 439 U.S. 988, 99 S.Ct. 584, 58 L.Ed.2d 661 (1978); *United States v. Kahn*, 471 F.2d 191 (7th Cir.1972), *rev'd other grounds*, 415 U.S. 143, 94 S.Ct. 977, 39 L.Ed.2d 225 and *United States v. Price*, 577 F.2d 1356 (9th Cir.1978), *cert. denied*, 439 U.S. 1068, 99 S.Ct. 835, 59 L.Ed.2d 33 (1979). This overwhelming weight of authority, and the absence of opposing authority in this circuit call for the application of the exception in this case.

The spouses here are charged jointly in both a *Klein* conspiracy and racketeering enterprise. The *in camera* submissions, consisting of the grand jury testimony, as compared against the face of the indictment, demonstrate a *prima facie* showing of the crime-fraud exception. As with the discussion of this exception and its application to the attorney-client privilege, it should not be the case that there is a wholesale abrogation of the privilege surrounding the entirety of Ferris' and Dolores' marital communications. Only those involved in the perpetration of a

crime or fraud should be found to overrule any assertion of privilege. *Valencia*, 541 F.2d at 621. Because the government should not logically be seeking affirmative proof, or impeachment through cross-examination into anything beyond this zone, the severance request should be denied.

Based upon the foregoing, the evidence adduced and submitted *in camera*, the briefs and arguments of counsel, and all the files and proceedings herein,

IT IS HEREBY RECOMMENDED that:

1. Defendants' motion to find the forfeiture provisions of 18 U.S.C. § 1963, when applied to a prosecution based on predicate offenses of obscenity, to be unconstitutional under the First Amendment be GRANTED;
2. Defendants' motion to find the pretrial restraining order provisions of 18 U.S.C. § 1963, when applied to a prosecution based on predicate offenses of obscenity, to be unconstitutional under the First Amendment be GRANTED;
3. Defendants' motion to dismiss Counts VI, VII, and VIII of the indictment on the foregoing grounds be DENIED;
4. The forfeiture provisions of the indictment be dismissed with prejudice;
5. The pretrial restraining order presently in effect be vacated, and any sum expended by defendants for its monitoring be restored to them within thirty days hereof, or upon any order of the trial court sustaining this recommendation;

6. Defendants' motions to otherwise find the RICO statute, when applied to a prosecution based upon predicate offenses of obscenity, unconstitutional under the First Amendment be DENIED;

7. Defendants' motions to find the RICO statute, as applied to a prosecution based upon predicate offenses of obscenity, to be unconstitutional in violation of the Ex Post Facto Clause be DENIED;

8. Defendants' motions to find the obscenity standard underlying the charged RICO predicate offenses and the offenses charged pursuant to 18 U.S.C. §§ 1465 and 1466, unconstitutional under the First Amendment by DENIED;

9. Defendants' motion to dismiss the indictment on grounds of equitable estoppel be DENIED;

10. Defendants' motion to dismiss the counts alleged under §§ 1465 and 1466 on grounds of temporal remoteness be DENIED;

11. Defendants' motion for leave to present an affirmative defense that he in good-faith mistakenly believed the materials in issue not to be obscene be DENIED;

12. Defendants' motion to dismiss Count I of the indictment on grounds of duplicity be DENIED;

13. Defendants' motion to dismiss Count I of the indictment on grounds of irreparable harm to the Sixth Amendment right to counsel and interference with the attorney-client privilege be DENIED;

14. Defendants' motion to dismiss Count I of the indictment on the grounds that it is properly chargeable

only as a conspiracy to violate 26 U.S.C. § 7206(1) be DENIED;

15. Defendants' motion to dismiss the indictment on grounds of prosecutorial misconduct before the grand jury be DENIED;

16. Defendants' motion to suppress evidence obtained by search and seizure be, until such time as the matter is briefed and heard, TAKEN UNDER ADVISEMENT;

17. Defendants' motion to suppress statements, including the product of electronic surveillance, be DENIED; and

18. Defendants' motion to suppress trial testimony of witness Robert Milavetz be DENIED.

DATED: September 30, 1989.

/s/ Janice M. Symchych
Janice M. Symchych

United States Magistrate

ORDER

Based upon the foregoing, the evidence adduced and submitted *in camera*, the briefs and arguments of counsel, and all the files and proceedings herein,

IT IS HEREBY ORDERED that:

1. Defendants' briefs regarding the motion to suppress evidence obtained by search and seizure shall be submitted to United States Magistrate Patrick McNulty,

and served on the United States, no later than October 20, 1989, with no further leave for extension;

2. The government's responsive brief regarding the motion to suppress evidence obtained by search and seizure shall be submitted and served no later than October 27, 1989;

3. Hearing on the motion to suppress evidence obtained by search and seizure, including all testimony and argument, is set for 10:00 a.m., November 14, 1989, before United States Magistrate Patrick McNulty in Room 530 United States Courthouse at 110 South Fourth Street in Minneapolis, Minnesota. All counsel and parties shall be present;

4. Defendant Tigue's motion for severance and separate trial from the remaining defendants is GRANTED;

5. Trial of the remaining defendants shall proceed prior to trial of defendant Tigue, to ensure that the trial of defendant Ferris Alexander, Sr. has concluded prior to any proposed use by defendant Tigue of materials deriving from their attorney-client relationship;

6. Defendants' motion to sever the tax-related counts of the indictment from the RICO and obscenity-related counts is DENIED;

7. Defendants' motions for severance from one another for trial, with the exception of defendant Tigue, are DENIED;

8. Defendants' motion for a *James* hearing regarding Count I of the indictment is DENIED;

9. Defendants' motion for disclosure of grand jury materials is DENIED;

10. Defendants' motion for disclosure of confidential informers is DENIED;

11. Defendants' motion for a list of government witnesses is DENIED;

12. Defendants' motion for pretrial disclosure of Jencks Act materials, to the extent that the government shall produce said materials 10 calendar days prior to trial, is GRANTED;

13. Defendants' motion to require government agents to retain rough notes is GRANTED;

14. Defendants' motions for discovery of Rule 16 and exculpatory materials, to the extent they cover information within the scope of FRCrP 16 and *Brady v. Maryland* and its progeny, are GRANTED;

15. Defendants' motion for disclosure of government agreements with witnesses are GRANTED;

16. Defendants' motion for notice of intent to utilize 404(b) evidence is DENIED;

17. Defendants' motion for a bill of particulars is DENIED;

18. Defendants' motions relating to jury selection, including the number of per-emptory challenges, the degree of information to be disclosed regarding prospective jurors, and the method of voir dire, are RESERVED FOR THE TRIAL COURT.

DATED: September 30, 1989.

/s/ Janice M. Symchych
Janice M. Symchych
United States Magistrate

APPENDIX C

UNITED STATES DISTRICT COURT
District of Minnesota

UNITED STATES OF AMERICA
V.
FERRIS J. ALEXANDER, Sr.

JUDGMENT INCLUDING
SENTENCE UNDER
THE SENTENCING
REFORM ACT
Case Number
4-89-85(1)

(Name of Defendant)

Deborah Ellis and
Robert E. Smith
Defendant's Attorney

THE DEFENDANT:

 pleaded guilty to count(s)_____

 X was found guilty on count(s) 1-9, 20-25, 28, 30, 31, 33-37, 39, 41 after a plea of not guilty.

Accordingly, the defendant is adjudged guilty of such count(s), which involve the following offenses:

<u>Title & Section</u>	<u>Nature of Offense</u>	<u>Count Number(s)</u>
SEE ATTACHED		

The defendant is sentenced as provided in pages 2 through _____ of this Judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

X The defendant has been found not guilty on count(s) 10-19, 26, 27, 29, 32, 38, 40, and is discharged as to such count(s).

— Count(s) _____ (is)(are) dismissed on the motion of the United States.

X The mandatory special assessment is included in the portion of this Judgment that imposes a fine.

It is ordered that the defendant shall pay to the United States a special assessment of \$ _____, which shall be due immediately.

It is further ordered that the defendant shall notify the United States Attorney for this district within 30 days of any change of residence or mailing address until all fines, restitution, costs, and special assessments imposed by this Judgment are fully paid.

Defendant's	<u>August 6, 1990</u>
Soc. Sec. Number:	Date of Imposition of
468-14-0838	Sentence
_____	<u>/s/ James M. Rosenbaum</u>
Defendant's	Signature of
mailing address:	Judicial Officer
4608 Ellerdale Road	James M. Rosenbaum
_____	<u>U.S. District Judge</u>
Minnetonka, Minnesota	Name & Title of
55345	Judicial Officer
_____	<u>Aug 13th, 1990</u>
Defendant's	Date
residence address:	
Same	

<u>Title and Section</u>	<u>Nature of Offense</u>	<u>Count Numbers</u>
18 U.S.C. § 371	Conspiracy to Defraud IRS	1
26 U.S.C. § 7206(1)	Filing False Tax Returns	2, 3
18 U.S.C. § 1962(d)	Conspiracy to Violate RICO	4
18 U.S.C. § 1962(a)	Investing Racketeering Proceeds	5
18 U.S.C. § 1962(c)	Conducting RICO Enterprise	6
18 U.S.C. § 1465	Interstate Transportation of Obscene Material for Sale	7, 8, 9, 20, 21, 22, 23, 24, 25, 28, 30, 31
18 U.S.C. § 1466	Sale of Obscene Material	33, 34, 35, 36, 37, 39
42 U.S.C. § 408(g)(2)	Use of False Social Security No.	41

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of 72 months as to Counts 4, 5, and 6, said sentences to run concurrently; 60 months as to Counts 1, 7, 8, 9, 24, 25, 33, 34, 35, 36, 37, and 39, said sentences to

run concurrently with each other and concurrently with the sentences imposed on Counts 4, 5, and 6; 36 months (three years) as to Counts 2, 3, 20, 21, 22, 23, 28, 30, 31, and 41, said sentences to run concurrently with each other and concurrently with the sentences imposed on Counts 1, 2, 3, 4, 5, 6, 7, 8, 9, 24, 25, 33, 34, 35, 36, 37, and 39.

X The Court makes the following recommendations to the Bureau of Prisons:

The federal facility at Rochester, Minnesota, as the place for service of sentence.

___ The defendant is remanded to the custody of the United States Marshal.

___ The defendant shall surrender to the United States Marshal for this district,

___ at ___ a.m.
___ p.m. on ___.

___ as notified by the Marshal.

X The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons

___ before 2 p.m. on August 28, 1990.

___ as notified by the United States Marshal.

___ as notified by the Probation Office.

RETURN

I have executed this Judgment as follows:

Defendant delivered on _____ to _____ at

_____, with a certified copy of this Judgment.

United States Marshal

By _____
Deputy Marshal

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of three years as to Counts 1, 4, 5, 6, 7, 8, 9, 24, 25, 33, 34, 35, 36, 37, and 39, said.

Sentences of supervised release to run concurrently.

While on supervised release, the defendant shall not commit another Federal, state, or local crime and will comply with the standard conditions that have been adopted by this court (set forth on the following page). If this judgment imposes a restitution obligation, it shall be

a condition of supervised release that defendant pay any such restitution that remains unpaid at the commencement of the term of supervised release. The defendant shall comply with the following additional conditions:

The defendant shall pay any fines that remain unpaid at the commencement of the term of supervised release.

The defendant shall not possess any firearms or dangerous weapons.

The defendant shall submit to periodic drug testing at the direction of the probation office.

STANDARD CONDITIONS OF SUPERVISION

While the defendant is on probation or supervised release pursuant to this Judgment:

- 1) The defendant shall not commit another Federal, state or local crime;
- 2) the defendant shall not leave the judicial district without the permission of the court or probation officer;
- 3) the defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month;
- 4) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

- 5) the defendant shall support his or her dependents and meet other family responsibilities;
- 6) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;
- 7) the defendant shall notify the probation officer within seventy-two hours of any change in residence or employment;
- 8) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by a physician;
- 9) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
- 10) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;
- 11) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;
- 12) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;
- 13) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

- 14) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

These conditions are in addition to any other conditions imposed by this Judgment.

FINE WITH SPECIAL ASSESSMENT

The defendant shall pay to the United States the sum of \$ 100,950 , consisting of a fine of \$ 100,000 and a special assessment of \$ 950 .

X These amounts are the totals of the fines and assessments imposed on individual counts, as follows:

\$50 special assessment, per count, as to Counts 1, 4, 5, 6, 7, 8, 9, 20, 23, 24, 25, 31, 33, 34, 35, 36, 37, 39, and 41.

\$100,000 aggregate fine as to Counts 1, 4, 5, 6, 7, 8, 9, 24, 25, 33, 34, 35, 36, 37, and 39.

This sum shall be paid X immediately.
as follows:

— The Court has determined that the defendant does not have the ability to pay interest. It is ordered that:

- The interest requirement is waived.
- The interest requirement is modified as follows:

RESTITUTION, FORFEITURE, OR OTHER PROVISIONS OF THE JUDGMENT

IS ADJUDGED AND ORDERED THAT:

As to Courts 1, 4, 5, 6, 7, 8, 9, 24, 25, 33, 34, 35, 36, 37, and 39, defendant shall pay the costs of his incarceration and supervised release. These amounts shall be: \$1,415.56 per month for the period of incarceration, and \$96.66 per month for the period of supervised release.

Defendant shall forfeit property and proceeds and pay costs of prosecution as set forth in this Court's order dated August 6, 1990. The August 6, 1990, order is hereby incorporated into this judgment.

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION
Criminal No. 4-89-85

UNITED STATES OF AMERICA,)	ORDER AND
Plaintiff,)	JUDGMENT OF
v.)	FORFEITURE
FERRIS J. ALEXANDER, SR.,)	
and WANDA MAGNUSON,)	Filed Aug. 6, 1990
Defendants.)	

WHEREAS, in the Indictment in the above-entitled case, plaintiff, the United States of America, sought the forfeiture of certain properties of defendant Ferris J. Alexander, Sr., (hereinafter referred to as the "defendant") pursuant to 18 U.S.C. § 1963;

AND WHEREAS, on May 23, 1990, a jury found the defendant guilty under 18 U.S.C. § 1962(a), (c) and (d);

AND WHEREAS, on May 25, 1990, the same jury found that the defendant has certain rights and interests in properties listed below which interests were used by the defendant to establish, operate, control, conduct or participate in the conduct of an enterprise and which property rights afforded him a source of influence over the enterprise pursuant to 18 U.S.C. § 1963(a)(2);

AND WHEREAS, on June 25, 1990 the United States submitted its claim, to the Court, of forfeiture under 18 U.S.C. § 1963(a)(1) and (a)(3), and this Court having found that the defendant has acquired and maintained interests in properties listed below in violation of Section

1962 and that said properties constitute or are derived from, proceeds which the defendant obtained, directly or indirectly, from racketeering activity in violation of Section 1962;

NOW THEREFORE IT IS ORDERED that the defendant's interests and rights in and to the following properties are forfeited to the United States of America, effective as of the date of this order:

1. Real property, including any buildings, improvements, appurtenances and fixtures thereof located at 614-616 Hennepin Avenue, Minneapolis, legally described as all of Lot 9, Block 3, Hoag and Bell's Addition, Hennepin County, Minnesota, and commonly known as the American Empress Theater and Bookstore, pursuant to 18 U.S.C. § 1963(a)(1); (a)(2)(D); and (a)(3).

2. Real property, including any buildings, improvements, appurtenances and fixtures thereof located at 311-315 East Lake Street, Minneapolis, legally described as Lots 38 through 41 inclusive, State Addition, Hennepin County, Minnesota, and commonly known as the AB Distributors, pursuant to 18 U.S.C. § 1963(a)(1); (a)(D); and (a)(3).

3. Real property, including any buildings, improvements, appurtenances and fixture thereof located at 739-743 East Lake Street, Minneapolis, legally described as

Lots One (1), Two (2), Three (3) and the North ten (10) feet of Lot Four (4) Block One (1) Chicago-Lake Park Addition to Minneapolis, except all that part of Lots One (1), Two (2), Three (3) and Four (4), Block One (1), Chicago-Lake Park

Addition to Minneapolis, described as follows: Beginning at the Northwest corner of said Lot One (1); thence South along the West line of Lots One (1), Two (2), Three (3) and Four (4) to a point ten (10) feet South of the Northwest corner of said Lot Four (4); thence East parallel with the North line of said Lot four (4), fifty-five (55) feet; thence North parallel with the West line of said Lots Four (4), Three (3) and Two (2), a distance of seventy-nine and sixty-five hundredths (79.65) feet; thence West parallel with the North line of said Lot Two (2), a distance of four and fifty-six hundredths (4.56) feet; thence North parallel with the West line of said Lot Two (2), a distance of one (1) foot; thence West parallel with the North line of said Lot Two (2), a distance of five and seventy-three hundredths (5.73) feet; thence North parallel with the West line of said lots Two (2) and One (1) to a point on the North line of said Lot One (1), said point being forty-four and seventy-one hundredths (44.71) feet East of the point of beginning; thence West along the North line of said Lot One (1) to the point of beginning, and excepting also from the land conveyed hereby, the South five (5) feet of the North ten (10) feet of that part of Lot Four (4), lying East of the West fifty-five (55) thereof.

Also the south thirty (30) feet, front and rear, of lot 4, and the north Ten (10) feet, front and rear, of Lot 5, all in Block 1, Chicago Lake Park Addition to Minneapolis,

and both according to the recorded plat thereof,

all in Hennepin County, Minnesota, and commonly known as the Chicago-Lake Bookstore, pursuant to 18 U.S.C. § 1963 (a)(1); (a)(2)(D); and (a)(3).

4. Real property, including any buildings, improvements, appurtenances and fixtures thereof located at 2936-2938 Lyndale Avenue South, Minneapolis, legally described as Lot 10, Auditor's Subdivision No. 187, the four corners of the tract are worked by judicial landmarks according to the plot thereof, Hennepin County, Minnesota, commonly known as the Nicola Bookstore, pursuant to 18 U.S.C. § 1963(a)(1); (a)(2)(D); and (a)(3).

5. Real property, including any buildings, improvements, appurtenances and fixtures thereof located at 315 South Broadway, Rochester, legally described as the Middle One-third of Lot 3, Block 10, Moe and Old's Addition to Rochester, Olmstead County, Minnesota, commonly known as Joey's Adult Bookstore, pursuant to 18 U.S.C. § 1963(a)(1); (a)(2)(D); and (a)(3).

6. Real property, including any buildings, improvements, appurtenances and fixtures thereof located at 319-323 South Broadway, Rochester, legally described as the North One-third of Lot 2, Block 10, the North One-half of the South two-thirds of Lot 2, Block 10; and the South One-third of Lot 2, Block 10, Moe and Old's Addition to Rochester, Olmstead County, Minnesota, commonly known as the Broadway Book II, pursuant to 18 U.S.C. § 1963(a)(1); (a)(2)(D); and (a)(3).

7. Real property, including any buildings, improvements, appurtenances and fixtures thereof located at 324-328 1/2 South Broadway, Rochester, legally described as:

Commencing on the East line of Broadway Street, in the City of Rochester, 65 $\frac{1}{2}$ feet North of the north line of College Street, in center of brick wall, there located and running East in center of said wall about 84 feet to a line hereafter described; thence Northerly on that line about 23 feet to a point 88 $\frac{1}{2}$ feet North of the North line of College Street, thence West along the center of party wall about 88 $\frac{2}{3}$ feet to the East line of Broadway Street; thence South to place of beginning, East line above referred to commencing on the North line of College Street 70 feet East of the East line of Broadway Street and running to a point on the South line of Third Street 140 feet East of the East line of Broadway Street. Said College Street is now known as Fourth Street S.E. Subject to party walls and subject to the real estate taxes due and payable in 1971. Together with

The North forty-three and one-half (43 $\frac{1}{2}$) feet of the South Sixty-five and one-half (65 $\frac{1}{2}$) feet of that part of the Mill Reservation of Moe and Olds Addition to the town, now city, of Rochester extending east from the east line of Broadway Street south to a line drawn from a point on the south line of Third Street Southeast one hundred forty (140) feet east of the east line of said Broadway Street South to a point in the north line of Fourth Street Southeast seventy (70) feet east of the east line of said Broadway Street South, subject to and together with party wall rights in the party walls of the buildings on the south and north lines of said lands, all in Olmstead County, State of Minnesota.

said property is commonly known as the Broadway Book I, pursuant to 18 U.S.C. § 1963(a)(1); (a)(2)(D); and (a)(3).

8. Real property, including any buildings, improvements, appurtenances and fixtures thereof located at 227 East Third Street, Winona, legally described as the Westerly 24 feet of the Easterly 46 feet of Lot 1, Block 144, original plat to Winona, located upon and forming a part of government Lot 2, Section 23, Township 107 North, Range 7, West of the Fifth Principal Meridian, Winona County, Minnesota, and commonly known as the Ultimate Bookstore, pursuant to 18 U.S.C. § 1963(a)(1); (a)(2)(D); and (a)(3).

9. Real property, including any buildings, improvements, appurtenances and fixtures thereof located at 621-623 University Avenue West, St. Paul, legally described as Lot 30, Block 1, Syndicate No. 1 Addition, Ramsey County, Minnesota, commonly known as The Flick, pursuant to 18 U.S.C. § 1963(a)(1); (a)(2)(D); and (a)(3).

10. Real property, including any buildings, improvements, appurtenances and fixtures thereof located at 341-347 East Lake Street, Minneapolis, legally described as Lot 24, Lot 25 and Lot 26, State Addition, Hennepin County, Minnesota, and commonly known as the Lake Street Bookstore, pursuant to 18 U.S.C. § 1963(a)(1); (a)(2)(D); and (a)(3).

11. All interests, holdings, assets and claims in non-corporate businesses known as:

AB Distributors
The Newspaper Club
Kenneth LaLonde Enterprises
LeRoy Wendling
The Superior Street Company
Express Entertainment

United States Video
 U.S. Video
 United States Video Distributors
 Baker Investments
 American Book Wholesalers
 A.B. Video
 A & B Distributors
 Bell Investments
 American Theater Supply Company
 Video Hits
 AB Distributing
 Magazine and Book Agency

including but not limited to inventory, accounts receivable, business name or names, vehicles, equipment, office furniture, computers, safes, television sets, video cassette recorders, U.S. currency, and all funds credited to the following bank accounts as of May 25, 1990:

a. A bank account held in the name of the Newspaper Club with the Union & Trust Company, Account No. 101084400.

b. A bank account in the name of A.B. Distributors with the First Bank - St. Anthony Falls, Account No. 206-3023-374.

c. A bank account in the name of Broadway Bookstore with the Marquette Bank and Trust, Rochester, Account No. 2389-625.

d. A bank account in the name of U.S. Video with the Marquette Bank and Trust, Rochester, Account No. 2488-925.

e. A bank account in the name of Wabasha Bookstore with the Norwest Bank, Duluth, Account No. 0116-863.

f. A bank account in the name of Ferris J. Alexander with the First Bank Duluth, Account No. 1095-930.

g. A bank account in the name of American Theater Supply and the Gardner Hotel with the Norwest Bank, Duluth, Account No. 116-848.

h. A bank account in the name of Ferris Alexander with the Merchants National Bank of Winona, Account No. 25-873.

i. A bank account in the name of Ferris Alexander, Edward Alexander and/or The American Book Wholesalers with the First Bank - St. Anthony Falls, Account No. 706-2051-334.

j. A bank account in the name of Haista Paska, Inc., d/b/a Video Hits, with the First Bank - St. Anthony Falls, Account No. 206-3027-052.

k. A bank account in the name of A.B. Video with the First Western State Bank, Account No. 44-057.

l. A bank account in the name of United States Video, Inc., and A. B. Distributors with the First State Bank of St. Paul, Account No. 15-05-510.

m. A bank account in the name of Video Hits with the Union Bank & Trust Co., account #101085400).

n. A bank account in the name of Haista Paska, Inc. d/b/a Video Hits with the First Bank - St. Anthony Falls, account #206-3027-052.

o. A bank account in the name of Video Hits with the Merchants National Bank of Winona, account #7-173; pursuant to 18 U.S.C. § 1963(a)(2)(A) and (a)(2)(D).

12. All rights, interests, holdings and claims in a non-corporate business entity known as The Flick, including inventory, equipment and furnishings, pursuant to 18 U.S.C. § 1963(a)(2)(A) and (a)(2)(D).

13. All rights, interests, holdings and claims in a non-corporate business entity known as The Wabasha Bookstore a/k/a The Wabasha Adult Bookstore, including inventory, equipment and furnishings, pursuant to 18 U.S.C. § 1963(a)(2)(A) and (a)(2)(D).

14. All rights, interests, holdings and claims in a non-corporate business entity known as The Lake Street Bookstore, including inventory, equipment and furnishings, pursuant to 18 U.S.C. § 1963(a)(2)(A) and (a)(2)(D).

15. All rights, interests, holdings and claims in a non-corporate business entity known as The Adult Entertainment Center, including inventory, equipment and furnishings, pursuant to 18 U.S.C. § 1963(a)(2)(A) and (a)(2)(D).

16. All rights, interests, holdings and claims in a non-corporate business entity known as the Chicago-Lake Bookstore, including inventory, equipment and furnishings, pursuant to 18 U.S.C. § 1963(a)(2)(A) and (a)(2)(D).

17. All rights, interests, holdings and claims in a non-corporate business entity known as the American Empress Theater and Bookstore a/k/a American Bookstore, including inventory, equipment and furnishings, pursuant to 18 U.S.C. § 1963(a)(2)(A) and (a)(2)(D).

18. All rights, interests, holdings and claims in a non-corporate business entity known as Nicola's Bookstore, including inventory, equipment and furnishings, pursuant to 18 U.S.C. § 1963(a)(2)(A) and (a)(2)(D).

19. All rights, interests, holdings and claims in a non-corporate business entity known as East Hennepin Video Book & Theater, including inventory, equipment and furnishings, pursuant to 18 U.S.C. § 1963(a)(2)(A) and (a)(2)(D).

20. All rights, interests, holdings and claims in a non-corporate business entity known as Broadway Book I, including inventory, equipment and furnishings, pursuant to 18 U.S.C. § 1963(a)(2)(A) and (a)(2)(D).

21. All rights, interests, holdings and claims in a non-corporate business entity known as Broadway Book II, including inventory, equipment and furnishings, pursuant to 18 U.S.C. § 1963(a)(2)(A) and (a)(2)(D).

22. All rights, interests, holdings and claims in a non-corporate business entity known as Joey's Adult Bookstore, including inventory, equipment and furnishings, pursuant to 18 U.S.C. § 1963(a)(2)(A) and (a)(2)(D).

23. All rights, interests, holdings and claims in a non-corporate business entity known as The Ultimate Bookstore, including inventory, equipment and furnishings, pursuant to 18 U.S.C. § 1963(a)(2)(A) and (a)(2)(D).

24. All rights, interests, holdings and claims in a non-corporate business entity known as Video Hits, Winona, including inventory, equipment and furnishings, pursuant to 18 U.S.C. § 1963(a)(2)(A) and (a)(2)(D).

25. The above-mentioned bank accounts (paragraph 15) and all funds credited to the accounts as of the date of this indictment and traceable from the accounts as of the date of and subsequent to the indictment together with the contents of any safe deposit box maintained by and on behalf of Ferris J. Alexander, pursuant to Title 18, United States Code, Section 1963(a)(1) and (a)(3).

26. The following personal property and the proceeds thereof: all 8 mm projectors, television monitors, coin boxes and their contents, safes, video cassette tape players, video cassettes, magazines, other printed material, shelving and display material, chairs, tables, office equipment and furniture, cash registers and their contents, U.S. currency, computers, adding machines, and other inventory, pursuant to 18 U.S.C. § 1963(a)(1) and (a)(3).

27. The following motor vehicles: a 1986 Dodge Van, Vehicle Identification No. 2B7FB13H8GK534657; a 1985 Chevrolet Van, Vehicle Identification No. 2GCEG25H2F416185; a 1976 EZ-Load Trailer, Vehicle Identification No. 61200D; pursuant to 18 U.S.C. § 1963(a)(1) and (a)(3).

28. All monies acquired, maintained, or constituting proceeds which the defendant obtained, directly or indirectly, from racketeering activity in violation of Section 1962 for the years 1985, 1986, 1987 and 1988 as follows:

(1) 1985 - \$2,011,543.58

(2) 1986 - \$1,856,820.52

(3) 1987 - \$2,484,845.00

(4) 1988 - \$2,557,339.00

TOTAL - \$8,910,548.10

pursuant to 18 U.S.C. § 1963 (a)(1) and (a)(3).

IT IS FURTHER ORDERED that the Attorney General or his designee is authorized to seize the property, to enter said properties by force if necessary, and dispose of it in accordance with law.

IT IS FURTHER ORDERED that the United States shall publish notice of this Order and its intent to dispose of the property in such manner as the Attorney General may direct. Any person, other than the defendant, asserting a legal interest in the property shall, within thirty (30) days of the final publication of this notice, or his receipt of direct written notice, whichever is earlier, petition the Court for a hearing to adjudicate the validity of his alleged interest in the property. The petition shall be signed by the petitioner under penalty of perjury and shall set forth the nature and extent of the petitioner's right, title, or interest in the property, the time and circumstances of the petitioner's acquisition of the right, title, or interest in the property, any additional facts supporting the petitioner's claim, and the relief sought.

IT IS FURTHER ORDERED that following the Court's disposition of all petitions filed, or if no such petitions are filed following the expiration of the period specified for the filing of such petitions, the United States shall

have their title to the property and may warrant good title to any subsequent purchaser or transferee.

IT IS FURTHER ORDERED that a money judgment shall be entered by the Clerk of Court in favor of the United States and against the defendant, Ferris J. Alexander, in the sum of \$8,910,548.10 and that said judgment shall accrue post-judgment interest from the date of this order at the rate allowable by law.

IT IS FURTHER ORDERED that the United States may apply to this Court for entry of a money judgment to the value of any property forfeited to the United States as set forth herein which property is determined to have been transferred, conveyed or liquidated by or on behalf of the defendant, his nominee or assign, at any time subsequent to the commission of any of the acts giving rise to forfeiture under 18 U.S.C. § 1963, or for such other relief as the Court deems appropriate.

LET JUDGMENT BE ENTERED ACCORDINGLY.

Dated: August 6th, 1990

/s/ James M. Rosenbaum
JAMES M. ROSENBAUM, Judge
United States District Court

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION
Criminal No. 4-89-85

United States of America)
v.) ORDER
) (Filed Aug. 13, 1990)
Ferris J. Alexander, et al.)

Jerome Arnold, Paul W. Murphy, Mary E. Carlson, 110 South Fourth Street, #234, Minneapolis, Minnesota, for the United States.

Robert E. Smith, 10 Universal City Plaza, #1600, Universal City, California 91608; and Deborah Ellis, 345 St. Peter Street, St. Paul, Minnesota 55102; for defendant Ferris Alexander.

Michael McGlennon, 333 Third Avenue South, Minneapolis, Minnesota 55415, for defendant Dolores Alexander.

Joseph Friedberg, 250 Second Avenue South, #205, Minneapolis, Minnesota 55401, for defendant Jefferey Alexander.

Dave G. Roston, 250 Second Avenue South, #225, Minneapolis, Minnesota 55401, for defendant Wanda Magnuson.

This matter is before the Court upon the government's motion for forfeiture, pursuant to 18 U.S.C. §1963(a)(1) and (a)(3). The government also requests payment of its costs of prosecution, pursuant to 28 U.S.C. §§1918 and 1920 and 26 U.S.C. §7206. The defendant was tried by a jury which found him guilty of one count of

conspiracy to commit tax fraud in violation of 18 U.S.C. §371, two counts of filing false tax returns in violation of 26 U.S.C. §7206, one count of conspiracy in violation of the Racketeering Influenced Corrupt Organizations Act (RICO), 18 U.S.C. §1962(d), two substantive counts of RICO in violation of 18 U.S.C. §1962(a) and (c), twelve counts of interstate transportation of obscene materials in violation of 18 U.S.C. §1465, six counts of selling obscene materials in violation of 18 U.S.C. §1466, and one count of use of a false social security number in violation of 42 U.S.C. §408(g)(2).

The government moves for forfeiture of the assets and proceeds of the racketeering activity and for the costs of prosecuting the tax, RICO, and individual obscenity counts.

Background

By agreement of the parties, a portion of the forfeiture issue was submitted to the jury following trial on the substantive counts. At the conclusion of this bifurcated proceeding, the jury concluded certain interests in property owned or controlled by the defendant were forfeitable pursuant to 18 U.S.C. §1962(a)(2). That section permits forfeiture of "any (A) interest in; . . . or (D) property or contractual right of any kind affording a source of influence over; any enterprise which the person established." 18 U.S.C. §1963(a)(2)(A),(D).

The jury determined, however, that some interests, claimed by the government to be forfeit, were not subject to forfeiture under part (a)(2). In particular, the jury found that there was no forfeiture interest as part of the

RICO enterprise in the Adult Entertainment Center; Video Hits, Winona; the Wabasha Adult Bookstore; and the East Hennepin Bookstore.

The government now seeks forfeiture of these same properties, pursuant to parts (a)(1) and (a)(3) of section 1963. Part (a)(1) provides, in relevant part, for forfeiture of "any interest the person has acquired or maintained in violation of section 1962." 18 U.S.C. §1963(a)(1). The final forfeiture provision, part (a)(3), contemplates forfeiture of "any property constituting, or derived from, any proceeds which the person obtained, directly or indirectly, from racketeering activity . . . in violation of section 1962." 18 U.S.C. §1963(a)(3). RICO's forfeiture provisions are mandatory; section 1963 specifically provides the Court "shall order" forfeiture to the United States. 18 U.S.C. §1963(a).

The government also requests forfeiture of \$8,910,548.10 as proceeds which it calculates to have been acquired directly or indirectly in violation of 18 U.S.C. §1962. This amount represents proceeds of the racketeering activity for the years 1985 to 1988. This sum, along with the other property which the jury determined forfeitable, was charged in the indictment as being subject to forfeiture. Further, the government asks the Court to seize various bank accounts associated with those entities considered by the jury, various items of personal property, equipment and inventory located on those premises, and at least three motor vehicles used by the criminal enterprise. The government contends these items are forfeitable, pursuant to section 1963(a)(1) and (a)(3).

Finally, the government requests the costs of pursuing its case against defendant. The prosecution has advanced an affidavit showing these costs to be \$29,737.84, of which \$16,536.24 is allocated to the tax counts. The government suggests imposition of costs on the tax counts is mandatory pursuant to 26 U.S.C. §7206(5), which provides the Court "shall" impose the costs of prosecution. 26 U.S.C. §7206. The government suggests the remainder of the costs should be imposed pursuant to the general costs statute, 28 U.S.C. §§1918 and 1920. While imposition of costs pursuant to these sections is discretionary, the government argues costs are appropriate in light of the scope of defendant's racketeering activities and the manner in which he attempted to evade prosecution.

The facts of this case have been well documented and need not be repeated here. See *United States v. Alexander*, mem. op. at 1-4 (D.Minn. January 24, 1990); *United States v. Alexander*, mem. op. at 1-3 (D.Minn. July 3, 1990). Beyond the evidence produced at trial, the only additional evidence pertinent to these issues is some nine magazines and 400 videos offered by the government, at a post-trial hearing, to demonstrate the extent of defendant's obscenity empire. The government suggests the Court may consider these items as evidence of the relationship between the racketeering enterprise and the property sought to be forfeited, particularly the proceeds.

Analysis

I. Forfeiture

A. Real Property, Interests in Businesses, Personal Property

1. Jury Verdict Pursuant to Section 1963(a)(2)

As an initial matter, the Court affirms the jury verdict of May 25, 1990, declaring real property and interests in property forfeitable, pursuant to section 1963(a)(2). The jury's determinations are supported by evidence beyond a reasonable doubt as to each finding in the special verdict. These properties are, therefore, declared forfeit to the United States, pursuant to 18 U.S.C. §1962(a)(2).

2. Property Declared Non-forfeitable by the Jury

As discussed, the jury, by its special verdict dated May 25, 1990, concluded the real property and interests in the Adult Entertainment Center; Video Hits, Winona; the Wabasha Adult Bookstore; and the East Hennepin Bookstore were not subject to forfeiture, pursuant to section 1962(a)(2). The jury determined defendant held no interest in these properties. The question presented by the government's motion is whether this property may now be forfeited by this Court by way of either section 1963(a)(1) or (a)(3). The Court must answer in the negative.

Section 1962(a)(2) and sections 1962(a)(1) and (a)(3) are clearly distinguishable. Yet, a properly instructed jury specifically concluded that defendant held no interest in

these properties for purposes of forfeiture, pursuant to section 1962(a)(2). As such, the government's conclusion that the properties were derived from or maintained by the RICO enterprise in accordance with sub-parts (a)(1) and (a)(3) cannot be other than suspect. It is well to recall that two co-defendants, including Dolores Alexander, were acquitted on all counts in this prosecution, including the RICO charges. While it cannot be more than conjecture, the jury may well have determined that Dolores Alexander and the other acquitted party held the interests in these properties and operated the properties outside the scope of, and independently from, the racketeering enterprise.¹

In any case, the Court concludes the evidence produced at trial and afterward was insufficient to support a forfeiture order under any of the section 1963 provisions. Although the government demonstrated some connection between the properties and the racketeering activities, the connection was minimal at best. The proof offered by the government was insufficient to sway the jury as to section 1963(a)(2) and is similarly unpersuasive as to sub-parts (a)(1) and (a)(3). The property sought by the government which was not determined forfeitable by the jury will not be forfeit by this Court.

¹ There was absolutely no evidence produced at trial suggesting co-defendant Wanda Magnuson, the other defendant found guilty of RICO charges, held any interest in the properties.

3. Personal Property, Equipment, and Inventory

The personal property, equipment, and inventory is forfeitable pursuant to either section 1963(a)(1) or (a)(3). Each of these items was identified in the indictment charging the racketeering activity.² The evidence presented at trial and in the ensuing forfeiture hearings makes clear these items were acquired or maintained as part of the racketeering activity in violation of section 1962. Much of the property was undoubtedly derived from proceeds of the ongoing enterprise.

More specifically, the personal property, inventory, and office equipment permitted defendant to carry on his racketeering activity. Defendant used the various items of office equipment to facilitate the sale of obscene materials and the conduct of the RICO enterprise. The personal property – including video cassette recorders, projectors, and furniture – located on the premises of the aforementioned real property and business clearly were maintained by, and used in, the continuing racketeering activity. A cursory review of those videos and magazines supplied by the government reveals that defendant acquired and distributed scores of materials which were similar in nature to those declared obscene. The Court has little doubt the inventory of videos and magazines held at the various properties previously determined forfeitable were part and parcel of defendant's racketeering

² The three automobiles were not specifically identified until trial. The indictment, however, provided the government would seek forfeiture of any motor vehicles associated with the racketeering enterprise.

scheme. As such, they are subject to forfeiture as set forth in the indictment and as provided pursuant to sections 1963(a)(1) and (a)(3).

The three motor vehicles – two vans and a trailer – also were maintained by the activities of the RICO enterprise. The evidence demonstrated the vehicles were purchased by the enterprise for use in the distribution of various materials to defendant's business properties. The vehicles were an integral aspect of the racketeering scheme and are, therefore, properly subject to forfeiture under section 1963(a)(1) and (a)(3).

4. Bank Accounts and Proceeds

The government asks the Court to forfeit bank accounts, all funds credited to and traceable from the accounts, and all safe deposit boxes associated with the business entities in which the jury determined defendant had an interest pursuant to section 1962(a)(2). The government also seeks forfeiture of \$8,910,548.10 as proceeds of the racketeering activity for the years 1985 through 1988. Both the accounts and the total proceeds were alleged as forfeitable in the indictment.

The broad extent of the government's request in this area of forfeiture poses a serious question of the relationship between the dollars generated in the sale or distribution of the videos and magazines declared obscene, and that portion of defendant's enterprises which were not obscene and were, perforce, not illegal. Plainly, there is

little chance that the sale of these few videos and magazines could generate such massive income to the enterprise.

In reply to these concerns, the government supplied the Court with the aforementioned 400 tapes and magazines. The Court has conducted a general review³ of these materials. There is little doubt some of it is of the same quality as that declared obscene. At the same time, much of the material is similar to that charged in those counts as to which the jury acquitted the defendants. The proffered evidence, therefore, is of assistance, but is not dispositive of this issue. Certainly interstate trafficking in obscene materials constitutes the RICO predicates here. But the question remains: Is the jury's verdict, finding a small number of materials to be obscene, sufficient to support such a vast forfeiture? The Court holds the forfeiture is supported by law and the facts of this case.

There is no question the proceeds of a racketeering enterprise are forfeitable, pursuant to section 1963. Part (a)(3) specifically contemplates the forfeiture of proceeds, and the term "interest" has long been defined to include proceeds and profits. 18 U.S.C. §1963(a)(3); *Rusello v. United States*, 464 U.S. 16, 22, 104 S.Ct. 296, 300, 78 L.Ed.2d 17 (1983); *United States v. Robilotto*, 828 F.2d 940, 948 (2d Cir. 1987), cert. denied, 484 U.S. 1011, 108 S.Ct. 7112, 98 L.Ed.2d 662 (1988). The availability for forfeiture

³ The Court reviewed the materials in a less rigorous fashion than is called for in determining "obscenity *vel non*," preliminary to submitting allegedly obscene materials to a jury. The Court has not spent the 450-600 hours which might have been required to view each of the video tapes in its entirety.

of proceeds of the racketeering activity arises out of courts' recognition that RICO forfeiture is an *in personam*, rather than *in rem*, punishment. *Robilotto*, 828 F.2d at 948-49; *United States v. Ginsburg*, 773 F.2d 798, 800 (7th Cir. 1985), *cert.denied*, 475 U.S. 1011, 106 S.Ct. 1186, 89 L.Ed.2d 302 (1986). This *in personam* nature places an emphasis on punishment to the criminal "by separating him from his ill-gotten benefits, rather than [on] confiscating 'guilty' items." *United States v. Vogt*, 713 F.Supp. 847, 860 (M.D.N.C. 1987).

In determining which proceeds are subject to forfeiture, the exact identity of dollars, or the tracing of funds, is not required. *Robilotto*, 828 F.2d at 948; *Ginsburg*, 773 F.2d at 801-803. RICO forfeiture, as an *in personam* penalty, deprives the defendant of all profits and proceeds acquired through the racketeering activity, "regardless of whether those assets are themselves 'tainted' by use in connection with the illicit activity." *Ginsburg*, 773 F.2d at 811; *United States v. Walsh*, 700 F.2d 846, 857 (2d Cir. 1983). As such, it "does not matter whether the government recovers the identical dollars . . . as long as the amount that the defendant acquired in violation of the statute is known." *Ginsburg*, 773 F.2d at 801. To require tracing would "simply provide an incentive for racketeers to engage in complicated financial transactions to hide their spoils." *United States v. Navarro-Ordas*, 770 F.2d 959, 970 (11th Cir. 1985), *cert. denied*, 475 U.S. 1016, 106 S.Ct. 1200, 85 L.Ed.2d 313 (1986); *Vogt*, 713 F.Supp. at 863. the government's ability to seize forfeitable proceeds may not be "abridged by intervening investment of tainted funds in non-enterprise assets." *Vogt*, 713 F.Supp. at 863.

The forfeiture of all proceeds is an appropriate punishment pursuant to the RICO provisions. To "truly separate the racketeer from his dishonest gains, . . . [RICO] requires him to forfeit . . . the total amount of the proceeds of his racketeering activity regardless of whether the specific dollars received form that activity" are those forfeited. *Ginsburg*, 773 F.2d at 802. As such, forfeiture extends to a defendant's "entire interest in the enterprise." *United States v. Busher*, 817 F.2d 1409, 1413 (9th Cir. 1987).

The determination of the amount of profits and proceeds of the racketeering activity cannot be precise. Courts, however, have concluded gross profits are at least one acceptable measure of proceeds. *United States v. Lizza Industries, Inc.*, 775 F.2d 492, 498 (2d Cir. 1985), *cert. denied*, 475 U.S. 1082, 106 S.Ct. 1459, 89 L.Ed.2d 716 (1986). Although this method poses potential difficulties in dividing moneys derived from the enterprise from those obtained independently, this concern alone will not undermine use of the gross profits figure.

Forfeiture under RICO is a punitive, not a restitutive, measure. Often proof of overhead expenses and the like is subject to bookkeeping conjecture and is therefore speculative. RICO does not require the prosecution to prove or the trial court to resolve complex computations, so as to ensure that a convicted racketeer is not deprived of a single farthing more than his criminal acts produced. RICO's object is to prevent the practice of racketeering, not to make the punishment so slight that the economic risk of being caught is worth the potential gain.

Lizza Industries, Inc., 775 F.2d at 498.

As discussed, the identity of the seized proceeds is not crucial. Rather, the important element is the *amount* received through the pattern of racketeering activity. *United States v. Connor*, 752 F.2d 566, 576 (11th Cir.), *cert. denied sub nom Taylor v. United States*, 474 U.S. 821, 106 S.Ct. 72, 88 L.Ed.2d 59 (1985) (emphasis original). Since the parties have stipulated to a court resolution of this issue, the jury's verdict is only one factor the Court may consider in determining forfeitability. But the Court notes that the appropriate nexus between the proceeds and the illegal activity may be demonstrated by the jury's verdict of guilt, particularly if the proceeds are addressed in the indictment. *Id.* at 577. In addition, the Court may consider all the evidence in the case, even circumstantial evidence, to determine the amount to be forfeited and the connection between the racketeering activities and the proceeds.⁴ *Vogt*, 713 F.Supp. at 866-67.

⁴ In many respects, the RICO forfeiture at issue is similar to forfeitures pursuant to 21 U.S.C. §881. Under section 881, if the government is able to demonstrate property is used in any manner to facilitate the sale of narcotics, the property is subject to forfeiture. *One Blue 1977 AMC Jeep v. United States*, 783 F.2d 759, 761 (8th Cir. 1986). Forfeiture is appropriate no matter how small the quantity of drugs, *United States v. One 1980 Red Ferrari*, 875 F.2d 186, 188 (8th Cir. 1989), or how little of the property is used to distribute. *United States v. Tax Lot 1500*, 861 F.2d 232, 235 (9th Cir. 1988), *cert. denied*, ___ U.S. ___, 110 S.Ct. 364, 107 L.Ed.2d 351 (1989); *United States v. Reynolds*, 856 F.2d 675, 676-77 (4th Cir. 1988); *United States v. Certain Real Property in Auburn, Maine*, 711 F.Supp. 660, 663 (D.Me. 1989); *United States v. Twelve Thousand Five Hundred Eighty Five Dollars*, 669 F.Supp. 939, 942 (D.Minn. 1987). While the forfeiture proceeding pursuant to 21 U.S.C. §881 is civil and *in rem*, its wide use and acceptance supports implementation of similar RICO measures.

Large scale forfeiture is entirely consistent with the provisions and purposes of RICO. This Court has previously commented upon the harsh punishment Congress clearly intended to impose under RICO. *Alexander*, mem. op. at 27-29 (D.Minn. January 24, 1990); *Ginsburg*, 773 F.2d at 802. The statute is intended to be given a broad reading and liberal interpretation. *Ginsburg*, 773 F.2d at 802. In keeping with this general approach to implementing RICO, a punishment for a RICO violation should be proportional to the racketeering crime. *Lizza Industries, Inc.*, 775 F.2d at 498; *United States v. Huber*, 603 F.2d 387, 397 (2d Cir. 1979), *cert. denied*, 444 U.S. 927, 100 S.Ct. 1312, 63 L.Ed.2d 759 (1980). A RICO forfeiture penalty "is keyed to the magnitude of a defendant's criminal enterprise." *Lizza Industries, Inc.*, 775 F.2d at 498.

These bank accounts, these traceable funds, and the eight million dollar figure were all contained in the indictment. The proceeds clearly supported the RICO scheme by providing the means and methods of transporting and selling obscene materials. Underlying those materials which the jury found obscene is that vast support system which made their existence and sale in this state possible.

In enacting RICO, and in granting its large penal power, Congress made clear its intent: a RICO enterprise is to be dismantled, root and branch. Mere forfeiture of the dollars obtained from an isolated criminal event would make this goal a mockery. These bank accounts and proceeds financed distribution of obscene materials. The money was acquired by investing in defendant's illegal enterprises. There is no doubt these funds are substantial. Yet, the evidence demonstrates beyond a

reasonable doubt the sum sought to be forfeit is not beyond the scope of the enterprise proven.

Defendant has vigorously and often contended the funds should be protected in light of the first amendment. It is clear that some of the proceeds were obtained in the sale and distribution of protected materials. But the proceeds were inextricably tied to an enormous racketeering enterprise, and their connection to arguably protected speech will not save them from the reach of RICO forfeiture. Given the nexus between the accounts and the proceeds, the Court approves and grants the government's request for forfeiture of these items.

II. Costs of Prosecution

The government seeks reimbursement, in the amount of \$29,737.84, for its costs of prosecution. The government suggests \$16,536.24 of this amount must be assessed pursuant to the mandatory language of 26 U.S.C. §7206(5). In any case, the government contends the entire amount is recoverable, pursuant to 28 U.S.C. §1918(b) and 1920. Section 1918(b) provides "[w]henver any conviction for any offense not capital is obtained in a district court, the court may order that the defendant pay the costs of prosecution." 28 U.S.C. §1918(b). Section 1920 permits this Court to impose various fees and costs of administration.

The language regarding mandatory imposition of costs, pursuant to 26 U.S.C. §7206(5), is identical to the language of 26 U.S.C. §7203. The Eighth Circuit has specifically held a district court has no discretion in imposing the costs of prosecution pursuant to section 7203. *United States v. Wyman*, 724 F.2d 684, 688 (8th Cir. 1984). The

costs are mandatory. *Id.* The identical language of section 7206(5) mandates a similar holding in this instance. See *United States v. Fowler*, 794 F.2d 1446, 1450 (9th Cir. 1986), *cert. denied*, 479 U.S. 1094, 107 S.Ct. 1309, 94 L.Ed.2d 157 (1987). As such, defendant is ordered to reimburse the costs of prosecution on the tax counts. This sum totals \$16,536.24. See *United States v. Palmer*, 809 F.2d 1504, 1506-08 (11th Cir. 1987); *United States v. Snowadzki*, 723 F.2d 1427, 1431 (9th Cir.), *cert. denied*, 469 U.S. 839, 105 S.Ct. 140, 83 L.Ed.2d 80 (1984); *United States v. Troiani*, 595 F.Supp. 186, 187 (N.D.Ill. 1984).

Imposition of costs pursuant to 28 U.S.C. §§1918 and 1920 is entirely within this Court's discretion. *United States v. Hiland*, No. 89-1222, slip op. at 51 (8th Cir. July 19, 1990); *United States v. Burchinal*, 657 F.2d 985, 997-98 (8th Cir.), *cert. denied*, 454 U.S. 1086, 102 S.Ct. 646, 70 L.Ed.2d 622 (1981). the Court, however, may not assess costs associated with those counts upon which defendant was acquitted or counts concerning co-defendants. *Hiland*, slip op. at 51. Costs of prosecution are entirely appropriate in a case involving obscenity charges. *United States v. American Theater Corp.*, 526 F.2d 48, 50-51 (8th Cir. 1975), *cert. denied*, 430 U.S. 938, 97 S.Ct. 1569, 51 L.Ed.2d 786 (1977).

The Court concludes costs of prosecution should be assessed for this entire prosecution. The scope of defendant's criminal involvement, particularly the tax conspiracy and racketeering activities, required extensive investigation and preparation on the part of the government. Given the dollar figures associated with defendant's tax and RICO crimes, justice will be served by requiring defendant, rather than the taxpayers at large, to

pay for the costs of prosecution. Defendant created his criminal empire and now must pay for its destruction. The \$29,737.84 cost of prosecution is, therefore, recoverable pursuant to 28 U.S.C. §§1918 and 1920.

Accordingly, IT IS ORDERED that:

1. Defendant hereby forfeits the property and proceeds considered in this order and specifically delineated in this Court's accompanying forfeiture order and judgment, dated August 6, 1990.

2. Defendant shall pay to the United States the sum of \$29,737.84 as the costs of prosecution.

Dated: August 10, 1990

/s/ James M. Rosenbaum
JAMES M. ROSENBAUM
United States District Judge

APPENDIX D
United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 90-5417MNM

United States of America,	*	
Appellee,	*	
vs.	*	Order Denying
Ferris Jacob Alexander, Sr.,	*	Petition for
a/k/a Pete Saba, Peter Saba,	*	Rehearing and
Paul Saba, John Thomas, Bob	*	Suggestion for
Olson, Jim Nelson, Jim	*	Rehearing En Banc
Peterson, James Peterson,	*	
Robert Carlson, Frank Netti,	*	
Appellant.	*	

Appellant's petition for rehearing with suggestion for rehearing en banc has been considered by the court and is denied by reason of the lack of a majority of the active judges voting to rehear the case en banc.

Rehearing by the panel is also denied.

October 30, 1991

Order Entered at the Direction of the Court:

/s/ Michael E. Gans

Clerk, U.S. Court of Appeals, Eight Circuit

APPENDIX E

UNITED STATES CONSTITUTION

Amendment I

"Congress shall make no law . . . abridging the freedom of speech, or of the press."

Amendment VIII

"Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

UNITED STATES CODE

18 U.S.C.A. § 1465 (West Supp. 1991)

"Whoever knowingly transports in interstate or foreign commerce for the purpose of sale or distribution, or knowingly travels in interstate commerce, or uses a facility or means of interstate commerce for the purpose of transporting obscene material in interstate or foreign commerce, any obscene, lewd, lascivious, or filthy book, pamphlet, picture, film, paper, letter, writing, print, silhouette, drawing, figure, image, cast, phonograph recording, electrical transcription or other article capable of producing sound or any other matter of indecent or immoral character, shall be fined not more than \$5,000 or imprisoned not more than five years, or both."

18 U.S.C.A. § 1466 (West Supp. 1991)

"(a) Whoever is engaged in the business of selling or transferring obscene matter, who knowingly receives or possesses with intent to distribute any obscene book, magazine, picture, paper, film, videotape, or phonograph or other

audio recording, which has been shipped or transported in interstate or foreign commerce, shall be punished by imprisonment for not more than five years or by a fine under this title, or both.

"(b) As used in this section, the term 'engaged on the business' means that the person who sells or transfers or offers to sell or transfer obscene matter devotes time, attention, or labor to such activities, as a regular course of trade or business, with the objective of earning a profit, although it is not necessary that the person make a profit or that the selling or transferring or offering to sell or transfer such material be the person's sole or principal business or source of income. The offering for sale of or to transfer, at one time, two or more copies of any obscene publication, or two or more of any obscene article, or a combined total of five or more such publications and articles, shall create a rebuttable presumption that the person so offering them is 'engaged in the business' as defined in this subsection."

18 U.S.C.A. § 1961 (West Supp. 1991)

"As used in this chapter -

(1) "racketeering activity" means . . . (B) any act which is indictable under any of the following provisions of title 18, United States Code: . . . sections 1461-1465 (relating to obscene matter)"

18 U.S.C.A. § 1962 (West 1984 and Supp. 1991)

"(a) It shall be unlawful for any person who has received any income derived, directly or

indirectly, from a pattern or racketeering activity . . . in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. . . .

"(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity

"(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section."

18 U.S.C.A. § 1963 (West Supp. 1991)

"(a) Whoever violates any provision of section 1962 of this chapter shall be fined under this title or imprisoned not more than 20 years . . . , or both, and shall forfeit to the United States, irrespective of any provision of State law -

(1) any interest the person has acquired or maintained in violation of section 1962;

(2) any -

(A) interest in;

(B) security of;

(C) claim against; or

(D) property or contractual right of any kind affording a source of influence over;

any enterprise which the person has established, operated, controlled, conducted, or participated in the conduct of in violation of section 1962.

The court, in imposing sentence on such person shall order, in addition to any other sentence imposed pursuant to this section, that the person forfeit to the United States all property described in this subsection. . . . "

2
No. 91-1526

Supreme Court, U.S.
FILED

APR 1 1992

OFFICE OF THE CLERK

In The
Supreme Court of the United States
October Term, 1991

FERRIS J. ALEXANDER, SR.,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition For A Writ Of Certiorari To The United States
Court Of Appeals For The Eighth Circuit

SUPPLEMENTAL PETITION FOR
A WRIT OF CERTIORARI

JOHN H. WESTON*
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**SUPPLEMENTAL PETITION FOR
A WRIT OF CERTIORARI**

On March 16, 1992, Petitioner filed his petition for writ of certiorari, in which he noted that the same First Amendment issue which he raised was pending before the Ninth Circuit in a pre-enforcement challenge to RICO forfeitures in obscenity cases. On March 12, as Petitioner's brief was being printed, the Ninth Circuit rendered its decision in that case, *Adult Video Association v. Barr*, 1992 WL 44493,¹ holding that the RICO forfeiture provision is facially unconstitutional insofar as "section 1963 mandates forfeiture of more property than the Constitution will tolerate as punishment for an obscenity offense." 1992 WL 44493, at *8. This decision creates a direct conflict between the Ninth Circuit on the one hand and the Fourth and Eighth Circuits on the other, regarding the constitutionality of blanket forfeitures under § 18 U.S.C. 1963(a) as punishment for obscenity offenses.

This newly rendered decision in *Adult Video Association v. Barr* has created direct splits of authority among the federal circuits on both questions Petitioner has presented in this case. Whereas the Fourth Circuit in *United States v. Pryba*, 900 F.2d 748 (4th Cir. 1989), and the Eighth Circuit below held that unlimited RICO forfeitures upon conviction for obscenity did not even implicate the First Amendment, the Ninth Circuit has now unanimously held that the First Amendment both requires scrutiny of the post-conviction remedy, and does indeed impose limits on obscenity-based RICO forfeitures.

¹ Petitioner's counsel in this case are also the attorneys for the plaintiffs in *Adult Video Association v. Barr*.

The Ninth Circuit held in *Adult Video Association* that "the breadth of RICO's current forfeiture provision is incompatible with the First Amendment," so that "tailoring of the scope of forfeiture is necessary." 1992 WL at 44493, at *10, *6. The court concluded that because such forfeitures jeopardize First Amendment interests, i.e., the right of the public to receive information and the right of the distributor to disseminate it, "those assets or interests of the defendant invested in legitimate expressive activity being conducted by parts of the enterprise uninvolved or only marginally involved in the racketeering activity may not be forfeited." 1992 WL at 44493, at *9. Overbroad forfeitures, the court noted, "hurt not just the defendant, but also those members of the public who wish to obtain sexually explicit and erotic videotapes." *Id.* at *9.

Citing this Court's recent decision in *Simon & Schuster*, the court concluded that "the incremental contribution that RICO's current sweeping forfeiture provisions make to the deterrence and destruction of criminal enterprises over what would be accomplished under a narrower definition of forfeitable assets does not justify the additional curtailment of constitutionally protected, sexually explicit speech." *Id.* The case at bar dramatically illustrates these concerns, where the government has closed virtually every erotica outlet in the Minneapolis/St. Paul area and has burned their protected inventories merely because seven items were found to be obscene.

As the *Wall Street Journal* observed, this Ninth Circuit decision is particularly "notable because it contradicts two federal appeals court rulings elsewhere in the country." Arthur S. Hayes & Neal Templin, "RICO Is Restricted in Pornography Cases," *Wall St. J.*, March 18,

1992, at B3. In those cases, as noted above, the Fourth and Eighth Circuits have held that once a defendant is convicted of obscenity offenses, the First Amendment becomes irrelevant and the mandatory language of § 1963(a) requires the court to forfeit the entire "enterprise."

The Ninth Circuit's decision in *Adult Video Association v. Barr* not only creates a dramatic split among the circuits on this question, it creates an *additional* split of authority which underscores the necessity of this Court's review. There is now a *three-way* split between this "middle ground" position, the Fourth and Eighth Circuit cases upholding RICO forfeitures, and the Arizona courts' holding that a statute authorizing massive forfeitures in obscenity cases would be facially invalid as a prior restraint under *Near v. Minnesota*. *State v. Feld*, 157 Ariz. 88, 745 P.2d 146 (Ariz. App. 1987); see also *United States v. California Publishers Liquidating Corporation*, 778 F. Supp. 1377 (N.D. Tex. 1991).

Unfortunately, therefore, the Ninth Circuit's decision has only further muddied the waters, especially as it leaves "for the district courts the specific formulation of RICO forfeiture orders that are consistent with the First Amendment." 1992 WL at 44493, at *9. This solution of the First Amendment problems posed by RICO forfeitures seems particularly anomalous, as it requires the courts to "rewrite" § 1963(a) piecemeal in individual cases, whereas the statute on its face *mandates* blanket forfeiture as the remedy. In short, the Ninth Circuit has neither sustained nor interpreted the challenged RICO forfeiture provisions, although it has to an unspecified extent invalidated them.

This opinion epitomizes the doctrinal confusion surrounding the government's use of the forfeiture remedy in obscenity cases, an issue which more clearly than ever requires immediate resolution by this Court. In contrast to the Fourth and Eighth Circuits, the Ninth Circuit has significantly restricted the use of RICO in obscenity cases, but has left district courts the daunting task of determining precisely where the undefined constitutional boundary lies. This unsettled state of the law will inevitably create disarray and disparity among the judgments district courts will order in these sensitive First Amendment cases, some following the Fourth and Eighth Circuit rule that blanket forfeitures are both constitutional and mandatory, others struggling to fashion an appropriately limited remedy under the Ninth Circuit rule, and some potentially adopting the Arizona rule that these forfeitures are simply unconstitutional. Given this widespread confusion among the various jurisdictions, the time for this Court to intervene to resolve this important question is now.

Respectfully submitted,

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Supreme Court, U.S.
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No. 91-1526

In the Supreme Court of the United States

OCTOBER TERM, 1991

FERRIS J. ALEXANDER, SR., PETITIONER

v.

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT*

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the forfeiture provisions of the RICO statute violate the First Amendment when the predicate acts of racketeering are obscenity violations and the forfeited property consists of the assets of a business dealing in magazines and video cassettes.

2. Whether the forfeiture of petitioner's property resulting from his RICO convictions was disproportionate to his crimes, in violation of the Eighth Amendment.

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals, Pet. App. 1-26, is reported at 943 F.2d 825. The opinion of the district court, Pet. App. 27-124, is reported at 736 F. Supp. 968.

JURISDICTION

The judgment of the court of appeals was entered on August 30, 1991. Pet. App. 163. A petition for rehearing was denied on October 30, 1991. On February 19, 1992, Justice Blackmun extended the time for filing a petition for a writ of certiorari to March 16, 1992, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the District of Minnesota, petitioner was convicted on one count of conspiring to defraud the United States by impeding the lawful functions of the Internal Revenue Service, in violation of 18 U.S.C. 371; two counts of filing false income tax returns, in violation of 26 U.S.C. 7206(1); one count of receiving and using income derived from a pattern of racketeering activity, in violation of 18 U.S.C. 1962(a); one count of conducting the affairs of an enterprise through a pattern of racketeering activity, in violation of 18 U.S.C. 1962(c); one count of conspiring to commit that offense, in violation of 18 U.S.C. 1962(d); 12 counts of transporting obscene material in interstate commerce for the purpose of sale or distribution, in violation of 18 U.S.C. 1465; six counts of engaging in the business of selling obscene material, in violation of 18 U.S.C. 1466; and one count of falsely representing a social security number for the purpose of impeding the IRS, in violation of 42 U.S.C. 408(g)(2) (1988).

Petitioner was sentenced to a total of six years' imprisonment, fined \$100,000, and ordered to pay the costs of the prosecution, his incarceration, and his supervised release. In addition, the court ordered forfeiture of petitioner's interest in several pieces of commercial real estate, his wholesale business and retail book and video stores, and the bank accounts, furniture, fixtures, and inventory of those businesses. He was also ordered to forfeit \$8,910,548.10, which constituted the proceeds of his racketeering activity. Pet. App. 145. The court of appeals affirmed.

1. Petitioner was in the "adult entertainment" business for 30 years, selling magazines, showing

movies, and selling and leasing video cassettes. He sold his products through retail stores, rental stores, and theatres in several Minnesota cities. The material was distributed to those stores from a central warehouse operated by petitioner, where the materials were wrapped in plastic, priced, and boxed. The sales of the sexually explicit materials generated millions of dollars in annual gross receipts for petitioner. Petitioner established sham corporations, and he used false names and names of employees in opening bank accounts, obtaining licenses, and complying with various state and federal reporting requirements. He also filed false tax returns in 1982 and 1983 that underreported his gross receipts by \$2.7 million. Pet. App. 3-7; Gov't C.A. Br. 17.

The four magazines and three video cassettes that were the basis for the racketeering and obscenity counts on which the jury convicted petitioner contained graphic depictions of nude men and women in groups of two or more engaging in heterosexual and homosexual intercourse, fellatio, cunnilingus, sodomy, and masturbation. The minimal conversation in the videos was sexually explicit in nature. Gov't C.A. Br. 17-18.

2. On appeal, petitioner contended that the forfeiture of nonobscene expressive material under the forfeiture provision of the RICO statute violates the First Amendment. Relying on the Fourth Circuit's decision in *United States v. Pryba*, 900 F.2d 748, cert. denied, 111 S. Ct. 305 (1990), the court of appeals held that forfeiture of such material under RICO does not violate the First Amendment as long as "there is a nexus established between the ill-gotten gains from racketeering activity and the protected materials forfeited." Pet. App. 21. The court emphasized the distinction between a prior restraint and a criminal

penalty imposed following a conviction for racketeering. *Id.* at 21-22. While the court acknowledged that the RICO forfeiture provisions could have some chilling effect on the exercise of First Amendment rights, the court explained that deterring the sale of obscene materials is a "legitimate end" of anti-obscenity laws, and that all criminal obscenity statutes have some tendency to inhibit the dissemination of nonobscene material. *Id.* at 22 (quoting *Fort Wayne Books, Inc. v. Indiana*, 489 U.S. 46, 60 (1989)).

Petitioner also claimed that the forfeiture order violated the Eighth Amendment's ban on cruel and unusual punishments. The court of appeals rejected that claim, again in reliance on the Fourth Circuit's decision in *United States v. Pryba*, 900 F.2d at 753, 756-757. The court noted that in *Pryba* the Fourth Circuit held that the Eighth Amendment was not violated by the forfeiture of a business with total annual sales of \$2 million, in which the forfeiture resulted from the seizure of \$105.30 of obscene material. Pet. App. 24-25.

ARGUMENT

1. Petitioner contends that the forfeiture provisions of the RICO statute, 18 U.S.C. 1963(a), violate the First Amendment when the predicate acts are obscenity violations and the property forfeited consists of the assets of a business dealing in expressive material, such as magazines and video cassettes. Pet. 14-26. That claim does not warrant review by this Court.

This Court has held that obscenity violations may serve as predicate acts for a conviction under state racketeering laws. *Fort Wayne Books, Inc. v. Indiana*, 489 U.S. 46 (1989). In *Fort Wayne Books*, the

Court acknowledged that the prison sentence and fine authorized by the state RICO statute there at issue were more severe than those authorized for a simple obscenity offense and that, as a result, some booksellers might "practice self-censorship and remove First Amendment protected materials from their shelves." 489 U.S. at 60. But the Court went on to observe that "deterrence of the sale of obscene materials is a legitimate end of state anti-obscenity laws, and our cases have long recognized the practical reality that 'any form of criminal obscenity statute applicable to a bookseller will induce some tendency to self-censorship and have some inhibitory effect on the dissemination of material not obscene.'" *Ibid.* (quoting *Smith v. California*, 361 U.S. 147, 154-155 (1959)). Accordingly, the Court concluded that "[t]he mere assertion of some possible self-censorship resulting from a statute is not enough to render an antiobscenity law unconstitutional." *Ibid.*

That analysis applies to the RICO forfeiture provisions at issue here. No First Amendment principle bars Congress from imposing a forfeiture penalty for engaging in a pattern racketeering activity consisting of multiple obscenity violations. See *Fort Wayne Books*, 489 U.S. at 60 ("[i]t is not for this Court . . . to limit the [government] in resorting to various weapons in the armory of the law") (quoting *Kingsley Books, Inc. v. Brown*, 354 U.S. 436, 441 (1957)). A forfeiture penalty is no more "chilling" than a prison sentence or fine. Indeed, if the indictment had simply alleged obscenity offenses, petitioner would have been subject to 60 years' imprisonment and a fine of \$3 million. That penalty is far more severe than the RICO forfeiture imposed here. See *United States v. Pryba*, 900 F.2d at 756.

Furthermore, there is no merit to petitioner's argument that the forfeiture of racketeering-related assets is impermissible where the forfeited property is the assets of a business dealing in expressive material. The purpose of the RICO forfeiture provisions is to "divorc[e] guilty persons from the enterprises they have corrupted." *United States v. Cauble*, 706 F.2d 1322, 1350 (5th Cir. 1983), cert. denied, 465 U.S. 1005 (1984). Expressive materials are subject to forfeiture "not because of any likelihood of obscenity, but because they were personal property realized through or derived from crime." *Western Business Systems, Inc. v. Slaton*, 492 F. Supp. 513, 514 (N.D. Ga. 1980). As the Ninth Circuit recently stated in *Adult Video Ass'n v. Barr*, No. 90-55252 (Mar. 12, 1992), slip op. 2563, "[d]efendants simply have no First Amendment right to use the profits and proceeds from trafficking in obscenity to finance their constitutionally protected speech." That the RICO predicate acts are obscenity violations rather than, for example, narcotics violations is irrelevant. In either case, the purpose of the forfeiture is "not to restrain the future distribution of presumptively protected speech but rather to disgorge assets acquired through racketeering activity." *4447 Corp. v. Goldsmith*, 504 N.E.2d 559, 565 (Ind. 1987), rev'd on other grounds *sub nom. Fort Wayne Books, Inc. v. Indiana*, 489 U.S. 46 (1989). Indeed, if bookstores, newsstands, publishing houses, and the like were immune from forfeiture, drug lords and other criminals would waste no time in investing in those businesses and insulating their criminal proceeds from seizure. *Pryba*, 900 F.2d at 755; *Adult Video Ass'n*, slip op. 2563.

Petitioner errs in relying on *Near v. Minnesota*, 283 U.S. 697 (1931). There, a Minnesota law provided that the publication or sale of "malicious, scandalous

and defamatory" periodicals was a nuisance and could be judicially enjoined. *Near* published a newspaper that was found to be "malicious, scandalous and defamatory," and the state court issued a permanent injunction against him, prohibiting him from conducting any further business under the name and title of the newspaper. This Court held that the state nuisance abatement law constituted a prior restraint and violated the First Amendment. *Id.* at 713. Unlike the RICO forfeiture provisions, however, the object of the statute in *Near* "[was] not punishment, * * * but suppression of the offending newspaper or periodical." *Id.* at 711.

Unlike the defendant in *Near*, petitioner is free to engage in the production and distribution of any First Amendment-protected material after the forfeiture. Expressive material was forfeited not for the purpose of suppressing it, but because it happened to constitute an asset of a racketeering enterprise. As the Fourth Circuit explained in *United States v. Pryba*, 900 F.2d at 754-755, "*Near* has no application to obscenity, and sheds no light" on the question of the constitutionality of RICO forfeiture in obscenity cases.

Nor is petitioner helped by *Simon & Schuster, Inc. v. Members of the New York State Crime Victims Board*, 112 S. Ct. 501 (1991). In that case, the Court held unconstitutional New York's "Son of Sam" law, which required that an accused or convicted criminal's income from works describing his crime be deposited in an escrow account to be made available to the victims of the crime and the criminal's other creditors. The Court explained that the statute impermissibly created a financial disincentive to the exercise of First Amendment rights by "singl[ing] out income derived from expressive activity for a

burden the State places on no other income," and by targeting "only * * * works with a specified content."

Id. at 508. The RICO forfeiture provisions, by contrast, do not create a financial disincentive to speak or write, nor do they target expressive activity at all. They merely "preclude[] * * * defendant[s] from using assets derived from [racketeering] to subsidize future speech." *Adult Video Ass'n*, slip op. 2563. Nothing in *Simon & Schuster* suggests that that purpose is unconstitutional.¹

¹ Petitioner cites several decisions invalidating other types of state action aimed specifically at restricting expressive activity, such as padlocking a business where obscenity offenses occurred in the past or revoking a business license because of an obscenity violation. *E.g.*, *Vance v. Universal Amusement Co.*, 445 U.S. 308 (1980); *City of Paducah v. Investment Entertainment, Inc.*, 791 F.2d 463 (6th Cir.), cert. denied, 479 U.S. 915 (1986); *Gayety Theatres, Inc. v. City of Miami*, 719 F.2d 1550 (11th Cir. 1983); *Entertainment Concepts, Inc., III v. Maciejewski*, 631 F.2d 497 (7th Cir. 1980), cert. denied, 450 U.S. 919 (1981); *State v. Bauer*, 768 P.2d 175 (Ariz. Ct. App. 1988), cert. denied, 493 U.S. 1042 (1990). None of those cases bars the forfeiture of racketeering-related assets under the RICO statute just because those assets happen to consist of material protected by the First Amendment. Nor is petitioner helped by *State v. Feld*, 745 P.2d 146 (Ariz. Ct. App. 1987), cert. denied, 485 U.S. 977 (1988), in which a state court upheld the constitutionality of the State's RICO forfeiture provisions but apparently limited their application to the obscene materials themselves and to the proceeds of obscene material or of other racketeering activity. One state court's interpretation of its own state law, which predated this Court's decision in *Fort Wayne Books*, obviously has little bearing here. Finally, *J-R Distributors, Inc. v. Eikenberry*, 725 F.2d 482 (9th Cir. 1984), which petitioner also cites, was reversed on standing grounds by this Court *sub nom.* *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491 (1985), and therefore has no precedential value.

A few days before this petition was filed, the Ninth Circuit decided *Adult Video Ass'n v. Barr*, *supra*, which addressed the question whether RICO's post-trial forfeiture provisions violate the First Amendment. The court held that "[b]ecause a RICO forfeiture occurs only after a criminal trial on the obscenity issue, with its full panoply of procedural protections, the forfeiture represents punishment for engaging in obscenity rather than a prior restraint."

Slip op. 2561. Although the court concluded that "the authorization of a forfeiture does not by itself render the RICO statute unconstitutional," *id.* at 2564, it went on to say that "the current breadth of RICO's forfeiture provision cannot pass constitutional muster," *id.* at 2565. The court explained that the government can forfeit "assets actually used in connection with the obscenity offense—that is, used to produce, market, or move obscenity through interstate commerce." *Id.* at 2565-2566. The court also explained that the government may also forfeit "assets and interests substantially financed, directly or indirectly, by the proceeds of criminal activity."

Id. at 2566. But, according to the *Adult Video* court, "those assets or interests of the defendant invested in legitimate expressive activity being conducted by parts of the enterprise uninvolved or only marginally involved in the racketeering activity may not be forfeited." *Ibid.*

For the reasons discussed above, we take issue with the Ninth Circuit's holding that "the breadth of RICO's forfeiture provisions is incompatible with the First Amendment, and we have filed a petition for rehearing and a suggestion for rehearing en banc with the Ninth Circuit challenging that holding. Nonetheless, even if the Ninth Circuit adheres to the panel's decision in the *Adult Video* case, there is no

need for review by this Court, because it is not clear that the Ninth Circuit would upset the forfeiture order entered in this case. *Adult Video* involved only a facial attack on RICO's forfeiture provisions; the court explicitly left "for the district courts the specific formulation of RICO forfeiture orders that are consistent with the First Amendment, in light of the particular facts presented in individual cases." Slip. op. 2566. In the forfeiture order entered in this case, the district court found that all of the forfeited property constituted proceeds of racketeering activity, substantially facilitated the racketeering activity, or "supported the RICO scheme by providing the means and methods of transporting and selling obscene materials." Pet. App. 159. Such an order of forfeiture does not appear to fall outside the permissible scope of forfeiture even under the Ninth Circuit's decision in *Adult Video*.

2. Petitioner also challenges the forfeiture portion of his sentence under the Eighth Amendment Cruel and Unusual Punishments Clause. He does not challenge his six-year term of imprisonment, nor does he attack his fine or the requirement that he pay the costs of his incarceration and supervised release. Instead, he argues that the amount of the RICO forfeiture rendered it unconstitutional. Pet. 26-29. That claim does not warrant further review.

This Court recently explained that "the Eighth Amendment does not require strict proportionality between crime and sentence. Rather, it forbids only extreme sentences that are 'grossly disproportionate' to the crime." *Harmelin v. Michigan*, 111 S. Ct. 2680, 2705 (1991) (Kennedy, J., concurring in part and concurring in the judgment) (quoting *Solem v. Helm*, 463 U.S. 277, 288 (1983)); *id.* at 2684-2701 (opinion of Scalia, J.). What is more, "[o]utside the context of

capital punishment, *successful* challenges to the proportionality of particular sentences [will be] exceedingly rare." *Solem v. Helm*, 463 U.S. at 289-290 (quoting *Rummel v. Estelle*, 445 U.S. 263, 272 (1980)). A "reviewing court rarely will be required to engage in extended analysis to determine that a sentence is not constitutionally disproportionate," *Solem*, 463 U.S. at 290 n.16; "intra- and inter-jurisdictional analyses are appropriate only in the rare case in which a threshold comparison of the crime committed and the sentence imposed leads to an inference of gross disproportionality." *Harmelin*, 111 S. Ct. at 2707 (Kennedy, J., concurring in part and concurring in the judgment).

The court of appeals correctly held that the forfeiture of petitioner's property was not unconstitutionally disproportionate to his crimes. As this Court has explained, courts "should grant substantial deference to the broad authority that legislatures necessarily possess in determining the types and limits of punishments for crimes." *Solem*, 463 U.S. at 290. Congress has concluded that petitioner's offenses are serious. Under the penalties that Congress has set, petitioner's predicate obscenity offenses alone could have been punished by 60 years' imprisonment and a fine of \$3 million. In this light, the RICO forfeiture falls clearly within Eighth Amendment bounds. See *United States v. Pryba*, 900 F.2d at 756-757.

Petitioner's reliance on *United States v. Busher*, 817 F.2d 1409 (9th Cir. 1987); *United States v. Harris*, 903 F.2d 770 (10th Cir. 1990); and *United States v. Vriner*, 921 F.2d 710 (7th Cir. 1991), is unavailing. In those cases, the courts of appeals themselves conducted a proportionality analysis, or remanded the case to the district court for it to perform such an

analysis, in order to determine whether the interest ordered forfeited was so grossly disproportionate to the offense as to violate the Eighth Amendment. It is doubtful that those courts would have required a proportionality analysis in this case, however, since petitioner did not make out a prima facie case that the forfeiture was excessive. In fact, the court in *Busher* noted that a proportionality analysis need be conducted only if the defendant has made a prima facie showing that a forfeiture may be excessive. 817 F.2d at 1415. Petitioner did not even attempt to make a proffer in the district court as to the value of the forfeited assets, Gov't C.A. Br. 56, and there is no record evidence to support his claim, Pet. 26, that the value of his business was \$25 million. Accordingly, here, as in *United States v. Pryba*, 900 F.2d at 757, even if proportionality review otherwise would have been appropriate, petitioner has "failed to proffer the information that would be required for such an undertaking." Moreover, as noted above, the district court found that all of the forfeited property constituted proceeds of racketeering activity, substantially facilitated the racketeering activity, or "supported the RICO scheme by providing the means and methods of transporting and selling obscene materials." Pet. App. 159. Ordering that property forfeited is not grossly disproportionate to petitioner's crimes under the cases he cites.²

² It appears likely that the value of the forfeiture will be significantly less than petitioner now estimates. Of the 15 bank accounts forfeited, all but a handful had been closed at the time of the forfeiture, and those still active had either a negligible or negative balance. Eighteen of the forfeited business entities were essentially the same entity, representing the different names used by petitioner over the years for his sole proprietorship. The value of the tangible assets has yet to be determined

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JUNE 1992

but it appears likely that it will fall well short of petitioner's estimate. Gov't C.A. Br. 45.

JUN 22 1992

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Petition For A Writ of Certiorari
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PETITIONER'S SECOND SUPPLEMENTAL BRIEF

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October Term, 1991

SECOND SUPPLEMENTAL BRIEF

Petitioner filed a supplemental brief on April 2, 1992, in which he apprised this Court of the newly-decided Ninth Circuit case limiting RICO forfeitures in obscenity cases, Adult Video Association v. Barr, 960 F.2d 781 (9th Cir. 1992). On June 18, 1992, in apparent response to the appellants' petition for rehearing,¹ the Ninth Circuit issued an amended opinion which

¹ Petitioner's counsel herein also represent the plaintiffs/appellants in Adult Video Association v. Barr. They filed a petition for rehearing with the Ninth Circuit on April 27, 1992, urging the panel to reconsider portions of that opinion which seemed to approve the forfeitures of expressive businesses' neutral instrumentalities and constitutionally protected inventories of books, films, etc., in contrast to the opinion's central holding. Although denying the petition for rehearing, the panel amended the opinion, substantially addressing the doctrinal problems appellants had raised in their rehearing petition.

underscores that court's dramatic conflict with the Fourth and Eighth Circuits on the two issues raised in this case.² Excising the passage upon which the government has relied to minimize that conflict, the court in Adult Video makes abundantly clear that the Ninth Circuit would reject the total forfeiture in Petitioner's case, predicated upon the obscenity of only seven items.

The amended Ninth Circuit opinion in Adult Video elucidates what that court meant in its central holding: "to the extent section 1963 mandates more forfeiture than the Constitution will tolerate as punishment for an obscenity offense, the statute is unconstitutional on its face." Slip op. at 6836.

In the original version, there followed a discussion which seemed virtually to negate this holding:

"the current breadth of RICO's forfeiture provision cannot pass constitutional muster. Forfeiture of those assets actually used in connection with the obscenity offense -- that is, used to produce, market, or move

² For the Court's convenience, a copy of the Order and Amended Opinion in Adult Video is appended.

obscenity through interstate commerce -- does not run afoul of the First Amendment. Nor is the forfeiture of assets and interests substantially financed, directly or indirectly, by the proceeds of criminal activity constitutionally troublesome.

"However, those assets or interests of the defendant invested in legitimate expressive activity being conducted by parts of the enterprise uninvolved or only marginally involved in the racketeering activity may not be forfeited."

960 F.2d at 791.

From this text, the Adult Video court deleted the passage to which appellants in their rehearing petition had particularly objected as inconsistent and misleading:

"Forfeiture of those assets actually used in connection with the obscenity offense -- that is, used to produce, market, or move obscenity through interstate commerce -- does not run afoul of the First Amendment. Nor is the forfeiture of assets and interests substantially financed, directly or indirectly, by the proceeds of criminal activity constitutionally troublesome."

The government emphasized this language in its Opposition Brief, contending that the Ninth Circuit would not necessarily have disapproved the blanket forfeiture visited upon Petitioner Alexander. Opp. Br. at 9-10. Although the

government objected to the court's essential holding in Adult Video, and has yet pending a petition for rehearing or rehearing en banc, it apparently viewed the practical implications of this conflict as insignificant: "it is not clear that the Ninth Circuit would upset the forfeiture order entered in this case." Opp. Br. at 10.

The amended opinion, however, leaves no question but that the Ninth Circuit would reverse such a forfeiture as disproportionate and intolerably detrimental to the First Amendment interests involved. Following a discussion of "the need to tailor criminal rules narrowly and carefully when they seek to operate within the First Amendment arena," the court now holds that

"the current breadth of RICO's forfeiture provision cannot pass constitutional muster. At the very least, those assets or interests of the defendant invested in legitimate expressive activity being conducted by parts of the enterprise uninvolved or only marginally involved in the racketeering activity may not be forfeited. As in Busher [United States v. Busher, 817 F.2d 1409 (9th Cir. 1987)], district courts should not, absent exceptional circumstances, order forfeiture of a defendant's entire interest in an enterprise that

is essentially legitimate where he has committed relatively minor RICO [obscenity] violations not central to the conduct of the business and resulting in relatively little illegal gain in proportion to its size and legitimate income.'" Slip op. at 6837-38.

This language unquestionably places the Ninth Circuit in conflict with the Fourth and Eighth Circuits' diametrically opposed decisions approving blanket RICO forfeitures. In light of this amended opinion in Adult Video, the government cannot plausibly argue that the Ninth Circuit would permit a total forfeiture predicated upon the obscenity of only seven items, where the government has shown "'relatively little illegal gain in proportion to [the business'] size and legitimate income.'"

On both First and Eighth Amendment grounds, the Ninth Circuit has now decided both the issues Petitioner raises here in direct conflict with decisions of the Fourth and Eighth Circuits. Although the Adult Video court has decided the case primarily on First Amendment grounds, its continuing reliance upon Busher, an Eighth Amendment case, signals the Ninth

Circuit's conclusion that the Eighth Amendment as well would compel reversal of the forfeiture in the present case.

The government has indicated that it intends to seek this Court's review of the Adult Video decision if the Ninth Circuit rejects its petition for en banc reconsideration. Given this Court's preference for fully-developed factual records, which the facial challenge in Adult Video does not present, certiorari should be granted in this case to resolve these irreconcilable conflicts.

Dated: June 22, 1992

Respectfully submitted,

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FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ADULT VIDEO ASSOCIATION; DOE,
INC.; ROE, INC.; PAUL POE,
Plaintiffs-Appellants,

v.

WILLIAM BARR,* ATTORNEY
GENERAL OF THE UNITED STATES,
Defendant-Appellee.

No. 90-55252

D.C. No.
CV-87-7894-RSWL

**ORDER AND
AMENDED
OPINION**

Appeal from the United States District Court
for the Central District of California
Ronald S.W. Lew, District Judge, Presiding

Argued and Submitted
May 6, 1991—Pasadena, California

Filed March 12, 1992
Amended June 18, 1992

Before: Thomas Tang, Stephen Reinhardt and Charles
Wiggins, Circuit Judges.

Opinion by Judge Tang

*Attorney General William Barr is substituted for Richard Thornburgh as defendant/appellee, pursuant to Fed. R. App. P. 43(c).

SUMMARY

RICO/Constitutional Law

The court of appeals affirmed in part and reversed in part a district court judgment, holding, *inter alia*, that a portion of the RICO statute authorizing pre-trial seizures of obscene materials on the basis of probable cause is facially unconstitutional.

In 1984, Congress amended the RICO statute by adding to the list of predicate offenses constituting "racketeering activity" categories of acts punishable under state and federal criminal statutes. Appellants, a producer, a distributor, a retailer, and a consumer of sexually explicit videotapes (collectively, "Adult Video") brought an action against appellee, the U.S. Attorney General, contending the new provisions were facially unconstitutional under the First, Fifth, and Eighth amendments. Their complaint asserted that RICO's authorization of pre-trial seizures and its comprehensive post-trial forfeiture provisions amounted to unconstitutional prior restraints on speech. Adult Video also argued that RICO's severe penalties, coupled with the inherent uncertainty of deciding what qualifies as obscenity, chills constitutionally protected erotic and sexually explicit speech. The district court granted a government motion to dismiss for failure to state a claim (except as to a challenge to RICO's civil remedies.)

[1] Adult Video's apprehension concerning pre-trial seizures in RICO obscenity cases is reasonable. Adult Video has standing to litigate this claim. [2] The reasonable threat of prosecution confronting Adult Video necessarily entails a reasonable threat of post-trial forfeiture, and Adult Video therefore has standing on that issue also. [3] Further, the reasonable threat of pre-trial seizure effectively dispenses with any ripeness problem, and [4] Adult Video's objections to the post-trial remedy of forfeiture are also ripe.

[5] In this case, as in *Fort Wayne Books, Inc. v. Indiana*, 489 U.S. 46 (1989), the RICO statute simply incorporates the state and federal obscenity laws. Any vagueness or indefiniteness in RICO is constitutionally tolerable. [6] *Fort Wayne Books* also found that any additional deterrent effect on protected speech was the inevitable consequence of the criminal law's legitimate efforts to deter and punish obscenity.

[7] Adult Video also argued that RICO, as applied to obscenity, was facially invalid for overbreadth. [8] Adult Video's argument is little more than an amalgam of its unconstitutional prior restraint and chill arguments. [9] The Supreme Court has rebuffed an overbreadth argument on precisely this ground.

[10] *Fort Wayne* held that pre-trial seizures of allegedly obscene books and films under a state RICO statute violated the First Amendment. [11] That holding applies to this case. The First Amendment will not tolerate such seizures until the government's reasons for seizure are tested at an adversary hearing. [12] The portion of RICO that authorizes pre-trial seizures is unconstitutional on its face.

[13] This court declines to equate RICO's post-trial forfeitures with prior restraint, as argued by Adult Video. But some tailoring of the scope of forfeiture is necessary to harmonize that portion of the state with the First Amendment. [14] The prior restraint cases do not stand for the proposition that harmful speech can never be punished. [15] Unlike prior restraints, it is the defendant's unlawful commercial conduct, rather than anticipated speech, that sets into motion a RICO forfeiture. [16] Further, a RICO forfeiture does not silence a defendant; it is not a gag order. [17] However, to the extent that RICO mandates forfeiture of more property than the Constitution will tolerate as punishment for an obscenity offense, the statute is facially unconstitutional. [18] The Supreme Court has recognized the need to tailor criminal rules narrowly and carefully when they seek to operate within the First

Amendment arena. [19] In light of these precedents, the current breadth of RICO's forfeiture provision is unconstitutional. [20] In contrast to other offenses, forfeiture of assets for obscenity offenses hurts not just the defendant but also those members of the public who wish to obtain sexually explicit and erotic videotapes.

COUNSEL

John H. Weston, Brown, Weston & Sarno, Beverly Hills, California, for the plaintiffs-appellants.

Stan Blumenfeld, Assistant United States Attorney, Los Angeles, California, for the defendant-appellee.

ORDER

The opinion issued in this case on March 12, 1992, is amended as follows:

On page 2565 of the opinion, delete lines 31-32 (*i.e.*, "Forfeiture of those assets . . . market, or move"). On page 2566 of the opinion, delete lines 1-4 (*i.e.*, "obscenity through interstate commerce . . . constitutionally troublesome."). On line 5 of page 2566, delete the paragraph break and substitute "At the very least," for "However,".

OPINION

TANG, Circuit Judge:

Adult Video Association, Doe, Inc., Roe, Inc., and Paul Poe filed an action seeking a declaration that the federal Racketeer Influenced and Corrupt Organizations Act's ("RICO") crimi-

nal provisions are facially unconstitutional when enforced against obscenity offenses. The district court granted the government's motion to dismiss for failure to state a claim. The plaintiffs appeal only the district court's dismissal of their First Amendment challenge to RICO's criminal provisions. We affirm in part and remand in part.

BACKGROUND

RICO, 18 U.S.C. §§ 1961-1968, imposes severe penalties on any person convicted of engaging in a pattern of racketeering activity. The penalties include prison terms of up to twenty years, substantial fines, and forfeiture of

(1) any interest the [defendant] has acquired or maintained in violation of [RICO];

(2) any —

(A) interest in;

(B) security of;

(C) claim against, or

(D) property or contractual right of any kind affording a source of influence over;

any enterprise which the [defendant] has established, operated, controlled, conducted, or participated in the conduct of in violation of [RICO]; and

(3) any property constituting, or derived from, any proceeds which the [defendant] obtained, directly or indirectly, from racketeering activity or unlawful debt collection in violation of [RICO].

18 U.S.C. § 1963(a). Forfeiture is mandatory upon conviction. *Id.*

The statute also permits the government to apply to a district court for a pre-trial order to preserve assets for forfeiture. 18 U.S.C. § 1963(d). Courts may authorize pre-trial seizures of assets, issue restraining orders and injunctions, require the execution of performance bonds, and "take any other action to preserve the availability of property . . . for forfeiture." 18 U.S.C. § 1963(d)(1).

A defendant is guilty of engaging in a pattern of racketeering activity if that person commits two or more acts of "racketeering activity." 18 U.S.C. § 1961(5). The statute includes a laundry list of racketeering activities, any one of which may serve as a predicate offense in a pattern of racketeering. 18 U.S.C. § 1961(1). In 1984, Congress added to the list of predicate offenses "any act . . . dealing in obscene matter . . . which is chargeable under State law and punishable by imprisonment for more than one year" and "any act which is indictable under" the federal obscenity laws, 18 U.S.C. §§ 1461-1465. 18 U.S.C. § 1961(1); *see also* Pub. L. No. 98-473, 98 Stat. 1837 (1984).

The appellants, Adult Video Association, Doe, Inc., Roe, Inc., and Paul Poe (collectively, "Adult Video") are a producer, distributor, retailer, and consumer of sexually explicit videotapes, respectively. They brought an action against the Attorney General of the United States challenging RICO's provisions as facially unconstitutional under the First, Fifth, and Eighth amendments to the federal Constitution.¹

Adult Video's complaint asserts that RICO's authorization

¹Adult Video presses only the First Amendment claim in this appeal. The original action also attacked RICO's civil remedies, 18 U.S.C. § 1964, as unconstitutional. Adult Video does not contest the constitutionality of RICO's civil remedies here.

of pre-trial seizures and its comprehensive post-trial forfeiture provisions amount to unconstitutional prior restraints on speech. Adult Video also argues that the severe penalties RICO authorizes for as few as two obscenity violations, when combined with the inherent uncertainty of deciding what qualifies as obscenity, chills constitutionally protected erotic and sexually explicit speech. In support of its position, Adult Video cites the decision of *Roe, Inc.* not to rent or sell any sexually explicit videotapes and *Roe, Inc.*'s inability to obtain any non-explicit, erotic videotapes due to distributors' liability concerns. Adult Video also points to Paul Poe's asserted inability to rent or to buy sexually explicit videos for home viewing, because video stores fear that they will become the object of a racketeering prosecution.

The government moved under Fed. R. Civ. P. 12(b)(6) to dismiss Adult Video's action for failure to state a claim. In August 1989, the district court granted the motion with respect to every claim except the count challenging RICO's civil remedies. The court rejected Adult Video's argument that a First Amendment chill emanates from a combination of (i) the inherent ambiguities in the definition of obscenity, (ii) the lax scienter requirement for obscenity, and (iii) the severe punishments RICO authorizes.² The court characterized Adult Video's argument as little more than "an artful attempt to bypass" the Supreme Court's definition of obscenity in *Miller v. California*, 413 U.S. 15 (1973).

With respect to Adult Video's prior restraint argument, the district court held that RICO imposed "subsequent punishment," rather than a prior restraint, on defendants duly convicted of obscenity violations. Relying on *Arcara v. Cloud*

²Adult Video also included in this formula the stiff detention and sentencing provisions contained in the Bail Reform Act of 1984, 18 U.S.C. §§ 3142-43, 3147-48, and the Sentencing Reform Act of 1984, 28 U.S.C. §§ 991-98, as applied to obscenity prosecutions. Adult Video does not rely upon either of these statutes in its argument on appeal.

Books, Inc., 478 U.S. 697 (1986), the district court concluded that such subsequent punishment did not run afoul of the First Amendment.

Finally, the district court rejected the argument that section 1963(d)'s authorization of pre-trial seizures made the provision facially unconstitutional. The court acknowledged that the Supreme Court's opinion in *Fort Wayne Books, Inc. v. Indiana*, 489 U.S. 46 (1989), effectively foreclosed pre-trial seizures of allegedly obscene materials under RICO. The district court nonetheless found facial invalidation inappropriate because section 1963(d) authorizes a variety of other pre-trial measures the facial constitutionality of which Adult Video does not question.

In January 1990, Adult Video filed a motion for voluntary dismissal of its only remaining claim (the constitutionality of RICO's civil remedies). The district court granted the motion and entered a final judgment on January 25, 1990.

Adult Video subsequently filed a timely notice of appeal to this court.

DISCUSSION

I. *Standard of Review*

We review the district court's dismissal of the complaint for failure to state a claim de novo. *Hartford Accident & Indem. Co. v. Continental Nat'l Am. Ins. Cos.*, 861 F.2d 1184, 1185 (9th Cir. 1988). A complaint should not be dismissed unless it appears beyond doubt that the plaintiff can prove no set of facts in support of its claim which would entitle it to relief. *Western Reserve Oil & Gas Co. v. New*, 765 F.2d 1428, 1430 (9th Cir. 1985), *cert. denied*, 474 U.S. 1056 (1986). We limit our review to the contents of the complaint and construe all allegations of material fact in the light most favorable to Adult Video. *Id.*

II. Standing and Ripeness

While the parties do not contest Adult Video's standing, we have an independent obligation to verify its authority to adjudicate this case. *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 230-31 (1990). Because the federal government is not prosecuting Adult Video under RICO, Adult Video must show "a 'reasonable threat of prosecution for conduct allegedly protected by the Constitution.'" *Polykoff v. Collins*, 816 F.2d 1326, 1331 (9th Cir. 1987) (quoting *Ohio Civil Rights Comm'n v. Dayton Christian Schs., Inc.*, 477 U.S. 619, 625 n.1 (1986)); see also *Ripplinger v. Collins*, 868 F.2d 1043, 1047 (9th Cir. 1989).

Adult Video passes this test. Each of the parties alleges that it either produces, distributes, sells, or consumes erotic videotapes and that its activities either could subject it to RICO prosecution or are chilled by the threat of such prosecution. The government's active enforcement of RICO's obscenity provision against other videotape distributors³ demonstrates that the threat of prosecution is real. See *Virginia v. American Booksellers Ass'n*, 484 U.S. 383, 392-93 (1988).

While Adult Video does face a reasonable threat of prosecution, its complaint challenges more than the constitutionality of RICO obscenity prosecutions in and of themselves. Adult Video also objects to the seizures that may occur prior to prosecution and to the penalties that automatically follow a conviction. Consequently, our standing query must proceed one step further and determine whether Adult Video faces a reasonable threat of pre-trial seizure or post-conviction forfeiture. See *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 303 (1979).

³See, e.g., *United States v. Pryba*, 900 F.2d 748 (4th Cir.), cert. denied, 111 S. Ct. 305 (1990).

[1] Nothing in the record before us indicates that the Department of Justice has conducted pre-trial seizures in RICO obscenity cases. *See Fort Wayne Books*, 489 U.S. at 67 n.13 (noting that the United States asserted in its 1988 *amicus curiae* brief that it did not engage in such activity). The statute nevertheless authorizes such seizures. In addition, no formal policy of the Department of Justice prohibits its prosecutors or officers from pursuing pre-trial seizures, and enforcement practices may change at any time in any case. Consequently, Adult Video's apprehension concerning pre-trial seizure is reasonable. Therefore, Adult Video does have standing to litigate this claim.

[2] Likewise, because RICO mandates forfeiture upon conviction and expressly defines its scope, leaving district courts no discretion to limit it, we hold that the reasonable threat of prosecution confronting Adult Video necessarily entails a reasonable threat of post-trial forfeiture. *See Sequoia Books, Inc. v. Ingemunson*, 901 F.2d 630, 633-34 (7th Cir.) (court entertains pre-enforcement challenge to post-conviction forfeiture provision), *cert. denied*, 111 S. Ct. 387 (1990); *cf. Babbitt*, 442 U.S. at 303 (challenge to vagueness of criminal penalty provision). Adult Video thus has standing to challenge the post-trial forfeiture provision as unconstitutional.

With respect to the argument of an unconstitutional chill, Adult Video has alleged an actual injury. It alleges an immediate and tangible chill on distribution, as well as on a consumer's and a retailer's ability to obtain erotic and sexually explicit videotapes. "To the extent the provisions require [Adult Video] and similarly situated businesses to exercise self-censorship, they are required to exercise self-censorship today." *Sequoia Books*, 901 F.2d at 634; *see also Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 64 n.6 (1963) (standing exists if governmental action impairs sales by the plaintiffs of arguably protected materials).

[3] The absence of an active prosecution against Adult Video also raises the question of ripeness. Our conclusion that

a reasonable threat of prosecution exists, for purposes of standing, effectively dispenses with any ripeness problem. The threat of a pre-trial (indeed, pre-prosecution) seizure may be reasonably discerned from the statute's text and the government's practices in other RICO cases.

[4] Adult Video's objections to the post-trial remedy of forfeiture are also ripe. Adult Video's fear of forfeiture is reasonable and is alleged currently to have a concrete impact on Adult Video's exercise of its First Amendment rights. See *Babbitt*, 442 U.S. at 303.⁴

III. *Unconstitutional Chill*

Adult Video contends that the combination of RICO's severe penalty provisions, the nebulous definition of obscenity, and the absence of a rigorous scienter requirement for obscenity offenses hangs like a Sword of Damocles over those engaged in sexually explicit speech, unconstitutionally chilling protected communication.

Adult Video's concerns about the fragility of sexually explicit speech and the likely consequences of its entangle-

⁴Since *Babbitt*, at least four Justices have expressed the view that "it does not follow that a challenge to whatever remedy might ultimately be fashioned (should liability be established and relief ordered) is ripe merely upon a showing of a 'reasonable threat' that proceedings will commence." *Ohio Civil Rights*, 477 U.S. at 633 n.4 (Stevens, J., concurring) (original emphasis); see also *Fort Wayne Books*, 489 U.S. at 60 (challenge to state RICO civil forfeiture not ripe because "[t]hese claims can only be reviewed when (or if) such remedies are enforced against petitioner"). These cases are distinguishable, though, because the only uncertainty in this case is whether prosecution will result. The federal RICO statute prescribes the penalty that district courts *must* impose. Justice Stevens' concurrence spoke to a situation where the adjudicative body had the authority to tailor its remedies to avoid a constitutional violation. See *Ohio Civil Rights*, 477 U.S. at 633 n.4. Likewise, the pursuit of civil forfeiture in addition to criminal penalties under Indiana's RICO statute is optional for prosecutors. See *Fort Wayne Books*, 489 U.S. at 60.

ment in this regulatory web have great practical appeal. The Supreme Court, however, has already rejected an essentially identical argument in *Fort Wayne Books*. There the Supreme Court found unpersuasive the bookstore operators' contention that the inherent vagueness of *Miller*'s obscenity standard and the draconian penalties attaching to a RICO conviction in Indiana transgressed the First Amendment. The Court characterized the vagueness argument as "nothing less than an invitation to overturn *Miller* — an invitation that we reject." 489 U.S. at 57; *see also Alexander v. Thornburgh*, 943 F.2d 825, 832 (8th Cir. 1991).

[5] Here, as in *Fort Wayne Books*, the RICO statute simply incorporates the state and federal obscenity laws — laws which Adult Video does not contend violate *Miller*'s constitutional limitations on the definition of obscenity. Whatever vagueness or indefiniteness plagues these statutes is, as long as *Miller* remains good law, constitutionally tolerable. Transporting these laws into RICO does not exacerbate the haziness of the obscenity definition. It simply alters the format for prosecuting repeated violations of the obscenity laws. *See Fort Wayne Books*, 489 U.S. at 58 ("Given that the RICO statute totally encompasses the obscenity law, if the latter is not unconstitutionally vague, the former cannot be vague either."); *Alexander v. Thornburgh*, 713 F. Supp. 1278, 1291 & n.7 (D. Minn.), *appeal dismissed*, 881 F.2d 1081 (8th Cir. 1989).

[6] The Supreme Court also dismissed the bookstore operators' objections to Indiana's stiff RICO penalties by declaring any additional deterrent effect on protected speech to be the inevitable consequence of the criminal law's legitimate efforts to deter and to punish obscenity:

It may be true that the stiffer RICO penalties will provide an additional deterrent to those who might otherwise sell obscene materials; perhaps this means — as petitioner suggests — that some cautious book-

sellers will practice self-censorship and remove First Amendment protected materials from their shelves. But deterrence of the sale of obscene materials is a legitimate end of state antiobscenity laws, and our cases have long recognized the practical reality that "any form of criminal obscenity statute applicable to a bookseller will induce some tendency to self-censorship and have some inhibitory effect on the dissemination of material not obscene."

Id. at 60 (quoting *Smith v. California*, 361 U.S. 147, 154-55 (1959)) (citation omitted); *see also Sequoia Books*, 901 F.2d at 637 ("The *in terrorem* effects of which Sequoia complains are simply the intended by-product of a legislative decision to punish those who deal in obscene materials and to make that business more costly."); *United States v. Pryba*, 900 F.2d 748, 756 (4th Cir.) (chill caused by RICO penalties does not violate the First Amendment because "[t]he fact that a person does some business disseminating protected materials cannot immunize that person from [penalties] that may be imposed for violation of criminal law") (quotation omitted), *cert. denied*, 111 S. Ct. 305 (1990); *Polykoff*, 816 F.2d at 1340 n.9.

Fort Wayne Books is thus dispositive of Adult Video's unconstitutional chill argument.

IV. *Unconstitutional Overbreadth*

[7] Adult Video argues that RICO, as applied to obscenity, is subject to facial invalidation for overbreadth. Specifically, Adult Video contends that the penalty provisions impermissibly stifle constitutionally-protected sexually explicit speech. Enforcement of RICO in the obscenity context, Adult Video continues, can never legitimately occur because any consequent forfeiture would represent an unconstitutional prior restraint.

The overbreadth doctrine constitutes an exception to the general rule requiring the constitutionality of a statute to be

tested against the conduct of the party before the court. It permits a party to challenge a law, not on the ground that the statute is unconstitutional as enforced against it, but rather on the ground that the statute's application to third persons not before the court violates the First Amendment. *Members of the City Council v. Taxpayers for Vincent*, 466 U.S. at 789, 798-99 & n.17 (1984); see also *New York v. Ferber*, 458 U.S. 747, 768-69 (1982).

[T]he transcendent value to all society of constitutionally protected expression is deemed to justify allowing attacks on overly broad statutes with no requirement that the person making the attack demonstrate that his own conduct could not be regulated by a statute drawn with the requisite narrow specificity. This is deemed necessary because persons whose expression is constitutionally protected may well refrain from exercising their rights for fear of criminal sanctions provided by a statute susceptible of application to protected expression.

Taxpayers for Vincent, 466 U.S. at 799 n.17 (quotations and citations omitted). In order to prevail, the plaintiff must demonstrate "substantial" overbreadth, " 'judged in relation to the statute's plainly legitimate sweep.' " *Taxpayers for Vincent*, 466 U.S. at 799-800 (quoting *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973)).

[8] In light of these precedents, we reject Adult Video's overbreadth challenge. Adult Video's argument is little more than an amalgam of its unconstitutional prior restraint and chill arguments. Adult Video has not demonstrated the type of showing necessary to maintain an overbreadth challenge on First Amendment grounds. Adult Video's overbreadth theory simply mirrors the constitutional arguments it makes concerning the RICO obscenity provisions' effects on its own ability to produce, distribute, sell, and consume sexually explicit videotapes.

[9] In *Taxpayers for Vincent*, the Supreme Court rebuffed an overbreadth argument on precisely this ground:

This is not . . . an appropriate case to entertain a facial challenge based on overbreadth. For we have found nothing in the record to indicate that the ordinance will have any different impact on any third parties' interests in free speech than it has on [plaintiffs].

. . . [Plaintiffs] have, in short, failed to identify any significant difference between their claim that the ordinance is invalid on overbreadth grounds and their claim that it is unconstitutional when applied to [them]. . . . [Plaintiffs] have simply failed to demonstrate a realistic danger that the ordinance will significantly compromise recognized First Amendment protections of individuals not before the Court.

Id. at 801-02.

V. *RICO's Pre-Trial Seizure and Post-Trial Forfeiture Provisions*

A. *Pre-Trial Seizures*

Adult Video contends that RICO's section 1963(d) is facially unconstitutional because it permits the pre-trial seizure of videotapes based only on a finding of probable cause to believe they are obscene.

[10] The Supreme Court's recent opinion in *Fort Wayne Books* leaves little room for argument over the unconstitutionality of pre-trial seizures of allegedly obscene materials. Indeed, the government foregoes any such argument here. The Supreme Court held in *Fort Wayne Books* that pre-trial seizures of allegedly obscene books and films pursuant to Indiana's RICO statute violated the First Amendment. "[P]robable

cause to believe that there are valid grounds for seizure," the Court explained, "is insufficient to interrupt the sale of presumptively protected books and films." 489 U.S. at 66.

[11] This holding translates readily to the federal RICO context. Indeed, the Supreme Court noted that Indiana's RICO statute was "similar" to the federal racketeering law. *Fort Wayne Books*, 489 U.S. at 67 n.13. Federal RICO also permits pre-trial seizures upon a showing of probable cause. Thus the Supreme Court's concern that films not be removed from circulation prior to "[a] determination that the seized items [are] 'obscene' or that a RICO violation *has occurred*" applies with equal vigor in this instance. *Id.* at 66 (original emphasis). The First Amendment will not tolerate such seizures until the government's reasons for seizure weather the crucible of an adversary hearing. *Id.* at 67 ("[W]here the RICO violation claimed is a pattern of racketeering that can be established only by rebutting the presumption that expressive materials are protected by the First Amendment, that presumption is not rebutted until the claimed justification for seizing books or other publications is properly established in an adversary proceeding.") (footnote omitted).⁵

[12] Because the reasoning of *Fort Wayne Books* is equally applicable to the federal RICO statute, we hold that the portion of section 1963(d) that authorizes pre-trial seizures is unconstitutional on its face.⁶ We therefore reverse on this issue and direct the district court to enter judgment for Adult Video.

⁵The Supreme Court's concerns about premature seizure of expressive material operate even more forcefully in this case. Under Indiana's law, the defendant had already been convicted of the predicate RICO offenses, so the seizures were based upon both a history of obscenity convictions as well as probable cause. *Fort Wayne Books*, 489 U.S. at 66. Under the federal RICO statute, the predicate offenses need not be established prior to trial.

⁶Because Adult Video does not challenge the other pre-trial procedures authorized by section 1963(d), we need not address their constitutionality.

B. *Post-Trial Forfeiture*

[13] Adult Video argues that RICO's post-trial forfeiture penalty constitutes an unlawful prior restraint because, by seizing assets beyond those adjudged obscene, it exacts as a toll for past transgressions the defendant's ability to communicate in the future. While we decline to equate these forfeitures with prior restraints, we also conclude that some tailoring of the scope of forfeiture is necessary to harmonize RICO's post-trial forfeiture penalty with the First Amendment.

1. *Prior Restraint*

Because a RICO forfeiture occurs only after a criminal trial on the obscenity issue, with its full panoply of procedural protections, the forfeiture represents punishment for engaging in obscenity rather than a prior restraint. "There is a historical distinction between prior restraints and criminal penalties in the first amendment setting, which has both practical consequences and a theoretical basis." *Polykoff*, 816 F.2d at 1337.

The primary concern animating the Supreme Court's prior restraint jurisprudence has been to prevent the government from seizing materials or otherwise halting speech prior to a determination that the speech is actually harmful. *See, e.g., Fort Wayne Books*, 489 U.S. at 66-67 (seizure inappropriate because effected prior to a judicial determination of obscenity); *Vance v. Universal Amusement Co.*, 445 U.S. 308, 316-17 (1980) (per curiam) (prior restraint unconstitutional because speech not yet adjudged unlawful); *A Quantity of Copies of Books v. Kansas*, 378 U.S. 205, 210 (1964) (warrant for seizure unconstitutional because not preceded by a hearing on obscenity); *Marcus v. Search Warrant of Property at 104 E. Tenth St.*, 367 U.S. 717, 731 (1961) (warrants to seize alleged obscenity unconstitutional because of inadequate procedural safeguards); *cf. Kingsley Books, Inc. v. Brown*, 354 U.S. 436, 444-45 (1957) (seizure after determination of

obscenity in a criminal trial does not violate the First Amendment). The Court's constant refrain has been that it is better to punish harmful speech after it occurs than to smother it at birth. *See, e.g., Vance*, 445 U.S. at 316 n.13 ("[A] free society prefers to punish the few who abuse rights of speech *after* they break the law than to throttle them and all others beforehand.") (original emphasis); *Near v. Minnesota ex rel. Olson*, 283 U.S. 697, 714-15 (1931).

[14] The prior restraint cases do not stand for the proposition that harmful speech can never be punished. To the contrary, case law expressly permits punishment so long as the process for determining the appropriateness of sanctions "embod[ies] the most rigorous procedural safeguards" and is "ringed about with adequate bulwarks." *Bantam Books*, 372 U.S. at 66. The protections contained in a criminal RICO prosecution — such as the allocation of the burden of proof, a heightened standard of proof, and adversariness — satisfy *Bantam's* command.

In *Kingsley Books*, the Supreme Court sustained a New York statute permitting the seizure of obscene books and an order enjoining the defendant from further distribution of such books because, unlike the prior restraint cases, a court imposed these penalties only after the books had been adjudged obscene in a criminal trial. 354 U.S. at 445 ("Unlike *Near v. Minnesota*, [the New York Law] is concerned solely with obscenity and . . . studiously withholds restraint upon matters not already published and not yet found to be offensive."); *see also Bantam Books*, 372 U.S. at 70 ("Criminal sanctions may be applied only after a determination of obscenity has been made in a criminal trial hedged about with the procedural safeguards of the criminal process.").

RICO likewise postpones forfeiture until a judicial determination of obscenity is made after a criminal trial.⁷ Only at this

⁷As noted earlier, we have no occasion to address the facial constitutionality of RICO's civil forfeiture provision, 18 U.S.C. 1964, in this case.

point does RICO permit "the seizure . . . of the instruments of ascertained wrongdoing." *Kingsley Books*, 354 U.S. at 444; *see also Sequoia Books*, 901 F.2d at 636 (post-trial forfeiture under Illinois obscenity statute does not violate the First Amendment because "Illinois does not attempt here to regulate the sale of protected reading materials or to close bookstores. It merely punishes past obscenity convictions."); *Western Business Sys., Inc. v. Slaton*, 492 F. Supp. 513, 514 (N.D. Ga. 1980) (post-trial forfeiture under Georgia's RICO statute does not entrench upon free speech rights).

[15] The purpose of the forfeiture is to strip the defendant of the tools and profits of criminal conduct and thereby to terminate the illegal enterprise. Thus, unlike prior restraints, it is the defendant's unlawful commercial conduct (dealing in obscenity) rather than the defendant's anticipated speech that sets into motion a RICO forfeiture. In *Arcara*, 478 U.S. at 705-07, the Supreme Court upheld an order of closure of an adult bookstore. It refused to equate the closure with a prior restraint in part because, as with RICO, non-expressive conduct (prostitution on the premises), rather than speech, prompted the closure. *Id.* at 705 n.2; *see also Pryba*, 900 F.2d at 755.

[16] Also like the orders sustained in *Arcara* and *Kingsley Books*, RICO forfeiture does not silence the defendant. Forfeiture simply precludes the defendant from using assets derived from the obscenity trade to subsidize future speech. *See Arcara*, 478 U.S. at 706 n.2 (order "impose[s] no restraint at all on the dissemination of particular materials, since respondents are free to carry on their bookselling business at another location"); *511 Detroit St., Inc. v. Kelley*, 807 F.2d 1293, 1299 (6th Cir. 1986) (heavy fines imposed under Michigan's anti-obscenity law do not constitute prior restraints because "there is no prospective legal restraint on any expression, obscene or protected, that [defendants]. . . may choose to undertake"), *cert. denied*, 482 U.S. 928 (1987). A forfeiture is not a gag order. RICO defendants do not risk contempt if

they revive that portion of their business dealing in sexually explicit and erotic videotapes after conviction. Defendants simply have no First Amendment right to use the profits and proceeds from trafficking in obscenity to finance their constitutionally protected speech. We agree with the Fourth Circuit that "defendants may not launder their money derived from racketeering activities by investing it in bookstores, videos, magazines and other publications. The First Amendment may be used as a shield, but it is not a shield against criminal activity." *Pryba*, 900 F.2d at 755.

2. *Scope of Forfeiture*

[17] Although we will not characterize RICO forfeiture as a prior restraint, we do consider it necessary to tailor the scope of the forfeiture permitted by statute to alleviate constitutional concerns about curtailing legitimate speech in the name of fighting obscenity. While the authorization of a forfeiture does not by itself render the RICO statute unconstitutional, to the extent section 1963 mandates forfeiture of more property than the Constitution will tolerate as punishment for an obscenity offense, the statute is unconstitutional on its face.

As noted earlier, the scope of RICO forfeiture is extremely broad, reaching nearly every asset remotely connected with the offense. "[F]orfeiture is not limited to those assets of a RICO enterprise that are tainted by use in connection with racketeering activity, but rather extends to the convicted person's entire interest in the enterprise." *United States v. Busher*, 817 F.2d 1409, 1413 (9th Cir. 1987). We have already observed that "RICO's breadth and inflexibility counsel[] caution, for no penalty is per se constitutional." *Id.* at 1414 (quotation omitted); cf. *Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.*, ___ U.S. ___, 112 S. Ct. 501, 511-12 (1991) (statute designed to deprive convicted criminals of profits and proceeds from publicizing their

crimes not sufficiently tailored to survive First Amendment scrutiny).

For purposes of comparison, a number of other obscenity statutes contain markedly less drastic forfeiture provisions than federal RICO does. Illinois's obscenity statute permits forfeiture only of the direct and indirect proceeds of obscenity violations and the assets used wholly or in part to subsidize the actual criminal conduct. *See Sequoia Books*, 901 F.2d at 632; *see also id.* at 637-38 (comparing the scope of forfeiture permitted by Illinois law and by federal RICO). The federal Child Protection and Obscenity Enforcement Act likewise limits forfeitures to (i) the obscene materials themselves, (ii) property constituting or traceable to the gross profits or proceeds obtained from the offense, and (iii) property actually used or intended to be used to commit or to promote the offense. 18 U.S.C. §§ 1466(a), 2253(a); *cf. Fort Wayne Books*, 489 U.S. at 65 ("[W]e assume without deciding that bookstores and their contents are forfeitable . . . when it is proved that these items are property *actually used in, or derived from*, a pattern of violations of . . . obscenity laws.") (emphasis added).⁸

[18] The Supreme Court, in the past, has recognized the need to tailor criminal rules narrowly and carefully when they seek to operate within the First Amendment arena. "Our decisions furnish examples of legal devices and doctrines in most applications consistent with the Constitution, which cannot be applied in settings where they have the collateral effect of inhibiting the freedom of expression, by making the individual the more reluctant to exercise it." *Smith*, 361 U.S. at 150-51 (citing examples); *see also Simon & Schuster*, 112 S. Ct. at 512 (New York's "Son of Sam" law held to be "inconsistent with the First Amendment" because not nar-

⁸Indiana's RICO statute requires forfeiture only of property "used in the course of, intended for use in the course of, derived from, or realized through" the racketeering activity. *Fort Wayne Books*, 489 U.S. at 51.

rowly tailored to achieve goal of compensating victims from the fruits of the crime); *Quantity of Books*, 378 U.S. at 211-12 (state may not treat ordinary contraband and obscene books the same for purposes of seizure because of the First Amendment concerns infusing the latter); accord *Speiser v. Randall*, 357 U.S. 513, 525 (1958) ("The separation of legitimate from illegitimate speech calls for . . . sensitive tools. . . .")

[19] In light of these precedents, the current breadth of RICO's forfeiture provision cannot pass constitutional muster. At the very least, those assets or interests of the defendant invested in legitimate expressive activity being conducted by parts of the enterprise uninvolved or only marginally involved in the racketeering activity may not be forfeited. As in *Busher*, district courts should not, absent exceptional circumstances, "order forfeiture of a defendant's entire interest in an enterprise that is essentially legitimate where he has committed relatively minor RICO [obscenity] violations not central to the conduct of the business and resulting in relatively little illegal gain in proportion to its size and legitimate income." 817 F.2d at 1415-16. Because Adult Video raises only a facial attack, we leave for the district courts the specific formulation of RICO forfeiture orders that are consistent with the First Amendment, in light of the particular facts presented in individual cases. *Cf. id.*

[20] The government no doubt believes that diminishing the scope of RICO forfeiture in this manner will dilute the statute's deterrent effect and risk a resurrection of the criminal enterprise. While these are important concerns, the incremental contribution that RICO's current sweeping forfeiture provisions make to the deterrence and destruction of criminal enterprises over what would be accomplished under a narrower definition of forfeitable assets does not justify the additional curtailment of constitutionally protected, sexually explicit speech. See *Simon & Schuster*, 112 S. Ct. at 509 ("[W]e have long recognized that even regulations aimed at proper governmental concerns can restrict unduly the exercise

of rights protected by the First Amendment.") (quoting *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575, 592 (1983)). Tailoring the scope of forfeiture acknowledges that in obscenity cases, unlike traditional RICO prosecutions, a countervailing concern for protecting the public's right to receive, as well as the defendant's right to engage in, non-obscene speech demands a more delicate approach to forfeitures. See *Marcus*, 367 U.S. at 736 (expressing concern for the "public's opportunity to obtain . . . publications" because the state's obscenity seizure law deterred the sale and distribution of speech falling under the First Amendment's aegis). The forfeiture of assets derived from drugs, arson, fraud, and murder rarely, if ever, implicates a public right of access to information. The forfeiture of assets loosely affiliated with obscenity offenses, by contrast, hurts not just the defendant, but also those members of the public who wish to obtain sexually explicit and erotic videotapes. Government "is not free to adopt whatever procedures it pleases for dealing with obscenity . . . without regard to the possible consequences for constitutionally protected speech." *Id.* at 731; see also *Smith*, 361 U.S. at 154 (strict liability provision in obscenity statute unconstitutional because it would "restrict the public's access to forms of the printed word which the State could not constitutionally suppress directly").

In sum, we hold that RICO's provisions permitting the pre-trial preservation of assets for forfeiture are not facially unconstitutional in obscenity cases. Only that part of section 1963(d) that authorizes pre-trial seizures of obscene materials on the basis of probable cause is unconstitutional. Post-trial forfeitures do not, on their face, amount to prior restraints. We find it necessary, however, to tailor the scope of RICO forfeitures in obscenity cases in order to conform the statute to the dictates of the First Amendment. So delineated, RICO's post-trial forfeiture provisions are not facially unconstitutional.

CONCLUSION

James Madison observed that "[s]ome degree of abuse is inseparable from the proper use of everything." *Near*, 283

U.S. at 718 (quoting *Report on the Virginia Resolutions, Madison's Works*, vol. iv, 544). Speech, perhaps more than any other constitutionally protected activity, offers a daily demonstration of the truth of Madison's words. The First Amendment, however, strictly regulates government's authority to punish expression in the name of curbing abuse. Our Constitution prefers to err on the side of protecting speech. "[I]t is better to leave a few of [speech's] noxious branches to their luxuriant growth, than, by pruning them away, to injure the vigour of those yielding the proper fruits." *Id.* (quoting *Report on the Virginia Resolutions, Madison's Works*, vol. iv, 544). RICO's scattershot method of criminal prosecution is ill-suited to the delicate task of policing sexually explicit expression.

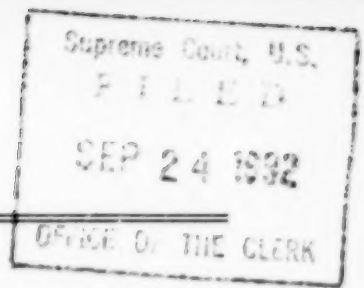
Although we hold that forfeiture provisions in general do not amount to unconstitutional prior restraints, the breadth of RICO's current forfeiture provision is incompatible with the First Amendment. Only those assets traceable to or substantially intertwined with the obscenity racketeering enterprise may be forfeited. Similarly, while we uphold section 1963(d)'s provision for the pre-trial preservation of assets, we invalidate that portion of the section that permits pre-trial seizures of obscenity merely on a showing of probable cause.

Adult Video has not made out a claim of overbreadth because it has not demonstrated that RICO impacts third parties' speech any differently than it does its own.

Finally, we reject Adult Video's unconstitutional chill argument, in light of the Supreme Court's disposition of a similar claim in *Fort Wayne Books*.

The decision of the district court is **AFFIRMED IN PART** and **REVERSED IN PART**. Each party to this appeal shall bear its own costs.

No. 91-1526



In The
Supreme Court of the United States
October Term, 1992

FERRIS J. ALEXANDER, SR.,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari To The United States
Court Of Appeals For The Eighth Circuit

JOINT APPENDIX

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Petition For Certiorari Filed March 16, 1992
Certiorari Granted June 29, 1992

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RELEVANT DOCKET ENTRIES

CRIMINAL DOCKET U.S. District Court

U.S. vs ALEXANDER, FERRIS JACOB

Case Filed			Docket No.	Def.
Mo.	Day	Yr.		
05	30	89	00085	01

DATE	DOCUMENT NO.	PROCEEDINGS
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5-30-89	1) INDICTMENT.	
	2) MOTION OF THE U.S. FOR ENTRY OF A RESTRAINING ORDER PURSUANT TO 18 USC 1963(d)(1)(A).	

* * *

	6) POST-INDICTMENT RESTRAINING ORDER PURSUANT TO 18:1963(d)(1)(A)	
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* * *

6-8-89	15) ORDER (JMR 6-7-89) that all pretrial matters shall be referred & assigned to Mag. Symchych.	
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* * *

6-22-89	20) STIPULATION TO MODIFY & AMEND POST INDICTMENT RESTRAINING ORDER PURSUANT TO 18 USC 1963(d)(1)(A).	
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	21) ORDER (JMR) AMENDING POST INDICTMENT RESTRAINING ORDER	
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* * *

6-29-89

- 24) ORDER (JMR) (6-29-89) IT IS HEREBY ORDERED that deft. is authorized to sell, convey & transfer title & possession of real estate, etc. to the city of St. Paul in accordance w/their purchase agreement. IT IS FURTHER ORDERED that the restraining order entered on 5-30-89 be amended to substitute the sale proceeds payable by the City for the Flick. Proceeds to be deposited w/Ramsey County District Court. Deft. restrained from assigning, pledging etc. sale proceeds w/o further order of this Court.

* * *

7-28-89

- 29) DEFENDANT'S MOTIONS:
- 1) to dismiss indictment;
 - 2) dismiss Cts. VI - XLI of indictment;
 - 3) dismiss indictment/irreparable damage to right of asst. counsel;
 - 4) dismiss Cts. of indictment violations of 18 U.S.C. 1466;
 - 5) dismiss Cts. VI, VII & VIII;
 - 6) dismiss based equitable estoppel & due process;
 - 7) dismiss & strike portions of indictment on due process, etc.;
 - 8) for relief from prejudicial joinder & misjoinder of deft's;
 - 9) for discovery etc.;
 - 10) disclosure & suppression of electronic surveillance [sic];

- 11) discovery & suppression of confessions/statements;
- 12) exclude testimony of Robert Milavetz;
- 13) discovery of exculpatory information;
- 14) discovery, inspection & copying under FED R. CRIM. R. 16
- 15) disclosure of impeaching information;
- 16) permit inspection of Grand Jury Trans.;
- 17) list of government witnesses;
- 18) bill of particulars;
- 19) Jencks Act Materials;
- 20) government agents to retain roughnotes;
- 21) requiring govt. to notify defense of intent to use evidence
- 22) disclosure of prospective jurors;
- 23) affidavit of Neal Shapiro;
- 24) additional peremptory challenges
- 25) disclosure of confidential informers;
- 26) compel govt. to disclose evidence favorable to deft;
- 27) permit affirmative defense;
- 28) designate [sic] the instant case as complex
- 29) to join in & adopt mtns. of co-deft's.

* * *

8-8-89

31) HEARING (JMS/BRT) on motions:

10-2-89

40) REPORT & RECOMMENDATION & ORDER (JMS 9-30-89) re motions:

1. to find the forfeiture provisions of 18:1963, when applied to a prosecution based on predicate offenses of obscenity, to be unconstitutional under the first amendment be granted;
2. find the pretrial restraining order provisions of 18:1963, when applied to a prosecution based on predicate offenses of obscenity, to be unconstitutional under the first amendment - granted;
3. dismiss counts 6, 7 & 8 - denied;
4. forfeiture provisions of the indictment - dismissed w/prejudice;
5. pretrial restraining order presently in effect be vacated, & any sum expended by defts for its monitoring be restored to them w/in 30 days hereof, or upon any order of the trial court sustaining this recommendation;
6. to otherwise find the RICO statute, when applied to a prosecution based upon predicate offenses of obscenity, unconstitutional under the first amendment be denied;
7. to find the RICO statute, as applied to a prosecution based upon predicate offenses of obscenity, to be unconstitutional in violation of the Ex Post Facto Clause be denied;

8. to find the obscenity standard underlying the charged RICO predicate offenses & the offenses charged pursuant to 18:1465 & 1466, unconstitutional under the first amendment be denied;
9. dismiss the indictment on grounds of equitable estoppel be denied;
10. dismiss the counts alleged under 18:1465 & 1466 on grounds of temporal remoteness be denied;
11. for leave to present an affirmative defense that he in good faith mistakenly believed the materials in issue not to be obscene be denied;
12. dismiss Count I of the indictment on grounds of duplicity be denied;
13. dismiss Count I of the indictment on grounds of irreparable harm to the 6th amendment right to counsel & interference w/the atty-client privilege be denied;
14. dismiss Count I of indictment on grounds that it is properly chargeable only as a conspiracy to violate 26USC 7206(1) be denied;
15. dismiss indictment on grounds of prosecutorial misconduct before the grand jury be denied;

16. suppress evidence obtained by search & seizure be, until such time as the matter is briefed & heard, under advisement.
17. suppress statements, including the product of electronic surveillance, be denied;
18. suppress trial testimony of witness Robert Milavetz be denied. Tigues's motion for severance & separate trial from the remaining defts. is granted;

* * *

10-30-89

- 53) DEFT'S MOTION FOR RETURN OF PROPERTY ILLEGALLY SEIZED PURSUANT TO RULE 41(E)

* * *

1-30-90

- 78) MINUTES OF JURY TRIAL (JMR/DMB) Jurors impaneled.

* * *

5-8-90

- 133) MINUTES OF JURY TRIAL (JMR/DMB) Closing arguments continued. Court charges jury.

5-8-90

- 133^{1/2}) AMENDED INDICTMENT

* * *

5-23-90

- 143) MINUTES OF JURY TRIAL (JMR/DMB) Jurors return w/verdict. Jurors informed that they would have to return on 5-24-90 and begin the forfeiture part of the trial for deft. Ferris Alexander only.

- 144) VERDICT - We the jury find deft. guilty as charged in Counts I-IX, XX-XXV, XXVIII, XXX, XXXI, XXXIII-XXXVII, XXXIX, XLI. We the jury find deft. not guilty as charged in Counts X-XIII, XV-XIX, XXVI, XXVII, XXIX, XXXII, XXXVIII, XL.

5-25-90

- 145) ORDER (JMR) ASSURING ASSET PRESERVATION IN IMPLEMENTATION [sic] OF 18 USC 1963.

- 146) SPECIAL VERDICT FORM AS TO FERRIS ALEXANDER.

5-24-90

- 147) MINUTES OF JURY TRIAL (JMR/DMB) Ferris Alexander is called. Closing arguments. Jury deliberations begin.

5-25-90

- 148) MINUTES OF JURY TRIAL (JMR/DMB) Jurors had 2 q. as. Jurors return special verdict.

* * *

6-1-90

- 151) ORDER (JMR) re: forfeiture of property. Forfeiture of the RICO properties may not be granted prior to sentencing; and its orders of 5-25-90 and 5-26-90 are vacated.

6-12-90

- 153) DEFENDANTS MOTION IN ARREST OF JUDGMENT AND IN THE ALTERNATIVE A MOTION FOR A NEW TRIAL.

* * *

8-6-90

- 167) ORDER AND JUDGMENT OF FORFEITURE (cc: attys)

* * *

- 8-6-90 169) ORDER (JMR) THAT: deft's motion for arrest of judgment or in the alternative for a new trial is denied.
- 8-13-90 170) ORDER (JMR)
 1) deft. hereby forfeits the property and proceeds considered in this order and specifically delineated in this Courts accompanying forfeiture order and judgment dated 8-6-90.
 2) deft. shall pay to the United States the sum of \$29,737.84 as the costs of prosecution.
- 8-6-90 171) SENTENCING (JMR/DMB) Deft. is committed to custody of BOP for impr. term of 72 months as to Counts 4,5, and 6. Said sentences to run concurrently; impr. term of 60 months as to counts 1,7,8,9,24,25,33,34,35,36,37 and 39, said sentences to run concurrently with each other and concurrently with the sentences imposed on Counts 4,5,and 6; impr. term of 36 months as to Counts 2,3,20,21,22,23,28,30,31 and 41, said sentences to run concurrently with each other and concurrently with the sentences imposed on Counts 1,2,3,4,5,6,7,8,9,24,25,33,34,35,36,37 and 39. Court recommends to BOP FMC at Rochester, Mn. as place for service of sentence. Deft. shall surrender for service of sentence at the institution desig. by BOP 8-28-90. Deft. to serve a supervised release term of 3 years as to Counts

1,4,5,6,7,8,9,24,25,33,34,35,36,37 and 39, said sentences of supervised release to run concurrently. Deft. to serve supervised release term with conditions. Deft. to pay \$950.00 special assess. Deft. to pay a \$100,000.00 fine. \$100,000.00 aggregate fine as to Counts 1,4,5,6,7,8,9,24,25,33,35,36,37 and 39. Deft. shall pay the costs of his incarceration and supervised release. These amounts shall be \$1,415.56 per month for the period of incarceration, and \$96.66 per month for the period of supervised release. Deft. shall forfeit property and proceeds and pay costs of prosecution as set forth in this Courts order dated 8-6-90. The 8-6-90 order is hereby incorporated into this judgment.

* * *

8-10-90

- 173) ORDER (JMR) 1) deft's motion for release of a \$50,000 Surety bond is denied; 2) governments motioin [sic] to revoke deft's RPR bond is granted & USMS is directed to arrest deft. and take him into custody forthwith [sic] or immediately upon his release by attending physicians from the Metropolitan - Mt. Sinai Medical Center;

* * *

8-9-90

- 175) Notice of Appeal to USCA, Eighth Circuit from Judgment & Commitment of 8-6-90.

* * *

9-6-90 183) DEFENDANTS MOTION FOR STAY OF FINE AND COSTS PENDING APPEAL PURS. TO RULE 38(c) OF THE FEDERAL RULES OF CRIMINAL PROCEDURE.

9-4-90 184) Notice of Appeal by plaintiff (USA) from Final Order and Judgment of 8-6-90 and 8-10-90.

* * *

9-7-90 186) MINUTES OF HEARING Deft. motion for stay of forfeiture - u/advisement. Deft's motion for stay on costs of confinement and fine - u/advisement. Deft's motion to reinstate bond pending appeal - u/advisement.

* * *

10-5-90 244) ORDER (JMR) THAT: deft's motion for stay of fines & costs is denied.

* * *

10-18-90 246) ORDER (JMR) THAT: deft's motion for release pending appeal is denied.

* * *

11-5-90 249)-
259) GOVERNMENTS MOTIONS FOR FINAL ORDER OF FORFEITURE.

* * *

11-6-90 262) DEFENDANTS NOTICE AND MOTION TO SET ASIDE WRIT OF EXECUTION.

11-8-90

270) ORDER (JMR) THAT: the USMS is hereby authorized to release to the United States Video, Inc., its agents or employee on appointment to be made which is mutually convenient to both U.S. Video, Inc. and the USMS and within 14 days following the date of this Order all the videos, filing cabinets, furniture and other office supplies and equipment more fully set forth in the inventory, a copy of which is attached, shall be released by the USMS to U.S. Video, Inc. and removed from the premises at 315 East Lake Street in the City of Mpls.

* * *

11-16-90

273) FINAL ORDER OF FORFEITURE (JMR) (11-15-90) THAT: the following property is condemned & forfeited to the United States as follows: The Westerly 24 feet of the Easterly 46 feet of Lot 1, Block 144, original plat to Winona, located upon and forming a part of Govt. Lot 2, Section 23, Township 107 North Range 7, West of the Fifth Principal Meridan, Winona County, Mn. 2) that the U.S. has clear title to the above-described real property and may warrant good title to any subsequent pruchaser [sic] or transferee by USMS Deed. 3) That the USAG or his designated agent shall direct the disposition of the property by sale or other commercially feasible means and the proceeds of any sale or other dismposition [sic] of

the property shall be used to pay all proper expenses for the forfeiture and the sale, including expenses of seizure, maintenance and custody of the property pending its desposition [sic], advertising, and court costs. 4) That the USAG or his designated agent shall deposit any remaining proceeds from the sale of the forfeited property into the Treasury purs. to title 18 USC 1963(f).

* * *

12-4-90

278) ORDER (JMR) (12-3-90) THAT: IT IS HEREBY ORDERED AND ADJUDGED THAT: the U.S. is hereby awarded judgment against Ferris J. Alexander Sr. in the sum of \$578,020.38 plus prejudgment interest from 12-16-88 to entry of this judgment at the rate of 8% per annum and further that said judgment accrue post-judgment interest at the rate allowed by law, until said judgment is paid in full.

12-7-90

279) INTERIM ORDER OF FORFEITURE (JMR) (12-6-90) * * *

* * *

1-22-91

280) ORDER (JMR) (1-18-91) THAT: Petitioners request that her property interest be recognized & exempted from forfeiture - denied.

* * *

1-30-91

282) FINAL ORDER (JMR)(1-28-91) OF FORFEITURE - re: Lot 10 Auditors Subdivision No.187.

283) FINAL ORDER (JMR)(1-28-91) OF FORFEITURE - re: 315 South Broadway, rochester [sic].

284) FINAL ORDER (JMR)(1-28-91) OF FORFEITURE - re: 319-323 South Broadway, Rochester.

285) FINAL ORDER (JMR)(1-28-91) OF FORFEITURE - re: 341-347 East Lake Street, Mpls.

286) FINAL ORDER (JMR)(1-28-91) OF FORFEITURE - re: Lot 9, Block 3, Hennepin County, Mn.

287) FINAL ORDER (JMR)(1-28-91) OF FORFEITURE - re: 311-315 East Lake Street, Mpls., Mn.

288) FINAL ORDER (JMR)(1-28-91) OF FORFEITURE - re: AB Distributors etc.

289) FINAL ORDER (JMR)(1-28-91) OF FORFEITURE - 739-743 East Lake Street, Mpls.

290) FINAL ORDER (JMR)(1-28-91) OF FORFEITURE - re: 324-328 1/2 South Broadway, Rochester, Mn.

291) FINAL ORDER (JMR)(1-28-91) OF FORFEITURE - re: 621-623 University Avenue West, St.Paul., MN.

* * *

4-22-91

297) GOVERNMENTS NOTICE OF ORDER AND JUDGMENT OF FORFEITURE.

* * *

3-12-91 299) Certified copy of Judgmen[t] from
USCA granting Appellants motion
to dismiss cross appeal.

* * *

7-23-91 302) ORDER (JMR) (7-22-91) THAT: on
8-6-90 a money judgment was
entered against deft. The govt.
served writs of executions on var-
ious financial institutions for
accounts held by deft. Some of the
accounts were held in the names of
deft's family members. Before the
Court ruled on the motion, deft.
filed for Chapter 11 bankruptcy.
ACCORDINGLY: this matter will be
referred to the bankruptcy court for
resolution. * * *

* * *

8-30-91 304) ORDER (JMR) THAT: 1) deft's bond
is hereby forfeited to the United
States. 2) Dolores Alexanders motion
for return of the posted bond is
denied.

* * *

11-14-91 311) CERTIFIED COPY OF MANDATE
FROM THE UNITED STATES
COURT OF APPEALS FOR THE
EIGHTH CIRCUIT.

312) CERTIFIED COPY OF JUDGMENT
THAT: After consideration, it is
hereby adjudged that the judgment
of the district court in this cause is
affirmed in accordance with the
opinion of this Court.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

CASE NO. 89-5364MN

Ferris Alexander,

Appellant,

vs.

Richard Thornburgh, in his official
capacity only as Attorney General
of the United States,
Appellee.

APPEAL FROM
DISTRICT OF MINNESOTA

NO. BELOW:
CIV 4-88-526

JUDGE BELOW:
DOTY

DATE OF JUDGEMENT:
5-5-89

* * *

TYPE OF CASE:
* * * US CIVIL

NATURE OF CASE:
Civil Rights - Other Civil Rights

* * *

DATE	FILINGS-PROCEEDINGS	* * *
1989		
7-11	DOCKETED appeal.	
* * *		
1990		
* * *		
May 14	DOCKET NOTE: This case is held in abeyance. We will await a criminal appeal and motion to consolidate the appeals. * * *	
* * *		
Aug. 7	ORDER: The court has considered the parties' statements regarding mootness * * *. It appears that Mr. Alexander has a criminal case before the United States District Court in which he has been convicted but not yet sentenced. Accordingly, it is ordered that this civil case be held for determination by the same panel that considers the criminal appeal. * * *	
* * *		
Aug. 22	DOCKET NOTE: Notice of appeal filed, case nos. 90-5417 and 90-5449 are consolidated with this appeal for submission to the Court.	
* * *		

1991

* * *

Mar. 13 ARGUED AND SUBMITTED AT ST. PAUL TO JUDGES JOHN R. GIBSON, FLOYD R. GIBSON AND WOLLMAN. * * *

* * *

Aug. 30 OPINION BY J.R. GIBSON PUBLISHED. w/5417

AUG. 30 JUDGMENT: The judgment of the district court in this cause is affirmed in accordance with the opinion of this Court. w/5417

* * *

Sept 16 Suggestion for rehearing en banc filed by aplnt in case No. 90-5417 UNTIMELY

Sept 20 Motion to file suggestion for rehearing en banc out of time filed by aplnt in case No. 90-5417

* * *

Oct 30 Suggestion for rehearing en banc denied in case No. 90-5417

Nov 11 REVISED JUDGMENT: The judgment of the district court is affirmed in accordance with the opinion of this court.

Nov 11 MANDATE ISSUED

* * *

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

CASE NO. 90-5417MN

United States of America,

Appellee,

vs.

Ferris Jacob Alexander, Sr.,

* * *

Appellant.

APPEAL FROM
DISTRICT OF MINNESOTA

No. BELOW:
CR 4-89-85

JUDGE BELOW:
ROSENBAUM

DATE OF JUDGEMENT:
08/06/90

TYPE OF CASE:
CRIMINAL

* * *

CASE NO.	RELATED NOS.	MISC. NO.
90-5417MN	w/90-5449MN	

DATE FILINGS-PROCEEDINGS * * *

1990

08-22 DOCKETED appeal.

* * *
DOCKET NOTE: This is to be consolidated
for submission to the Court with 89-5364MN.

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

UNITED STATES OF
AMERICA,

Plaintiff,

v.

FERRIS JACOB
ALEXANDER, SR.,
a/k/a PETE SABA,
a/k/a PETER SABA,
a/k/a PAUL SABA,
a/k/a JOHN THOMAS,
a/k/a BOB OLSON,
a/k/a JIM NELSON,
a/k/a JIM PETERSON,
a/k/a JAMES PETERSON,
a/k/a ROBERT JOHNSON,
a/k/a ROBERT CARLSON,
a/k/a FRANK NETTI,
DOLORES ALEXANDER,
JEFFREY ALEXANDER,
WANDA MAGNUSON, and
RANDALL D. B. TIGUE,

Defendants.

)
)
)
) INDICTMENT
) (AMENDED)

) (18 U.S.C. § 2)
) (18 U.S.C. § 371)
) (18 U.S.C. § 1465)
) (18 U.S.C. § 1466)
) (18 U.S.C. § 1962(a), (c)
) and (d))
) (26 U.S.C. § 7206(1))
) (42 U.S.C. § 408(g)(2))

THE UNITED STATES GRAND JURY CHARGES
THAT:

COUNT I

PARTIES

At all times material to this Indictment:

1. The Internal Revenue Service (hereinafter IRS)
was a constituent agency of the United States Department

of Treasury responsible for administering and enforcing the tax laws of the United States and collecting the taxes owed to the Treasury of the United States by its citizens.

2. Ferris Jacob Alexander, Sr. (hereinafter Ferris Alexander) was the owner, operator and proprietor, directly or indirectly through nominees, of the following business entities:

A B Distributors
 American Book Wholesalers
 A B Video
 Kenneth LaLonde Enterprises
 East Lake Properties, Inc.
 East Lake Cinema Corporation
 West Broadway Properties, Inc.
 Empress Theatre, Inc.
 American Book Store
 American Theatre
 Empress Theatre, Minneapolis, MN
 Franklin Theatre Corporation
 Lake Street Properties, Inc.
 Rialto Theatre, Minneapolis, MN
 Rialto Theatre I & II, Minneapolis, MN
 Strand Theatre, Duluth, MN
 Capitol Theatre, St. Paul, MN
 The Flick, Minneapolis, MN
 The Flick, St. Paul, MN
 Wabasha Book Store, St. Paul, MN
 KIMYBA, Inc.
 FUMYA, Inc.
 LeRoy Wendling
 A-Z Bookstore, Duluth, MN
 Gopher Theatre, Minneapolis, MN
 Aster Theatre, Minneapolis, MN
 Express Entertainment Corporation
 Express Entertainment

Bell Printing, Inc.
 U.S. Video
 The Lake Street Bookstore, Minneapolis, MN
 The Adult Entertainment Center, Minneapolis, MN
 Chicago-Lake Bookstore, Minneapolis, MN
 American/Empress Theatre & Bookstore, Minneapolis, MN
 Nicola's Bookstore, Minneapolis, MN
 East Hennepin Video Book & Theatre, Minneapolis, MN
 Broadway Book No. 1, Rochester, MN
 Broadway Book No. 2, Rochester, MN
 Joey's Adult Book, Rochester, MN
 Wabasha Adult Bookstore, Duluth, MN
 Ultimate Book Store, Winona, MN
 Video Hits, Winona, MN
 Video Hits, Crystal, MN
 American Theatre Supply Co., Inc.
 Yot Mo, Inc.
 Haista Paska, Inc., a/k/a Haista Pasta, Inc., Haistpka Corp.
 Ymparinen, Inc.
 Lipeakala, Inc.
 Kumantot, Inc.
 Utot, Inc.
 Bulbul, Inc.
 Kilikili, Inc.
 Karjalanpiirakka, Inc.
 Hammaslaakarimatkastanne, Inc.
 Gardner Hotel, Duluth, MN
 Northern Hotel, Duluth, MN
 Newspaper Club
 Superior Street Company
 Marlin Gas and Oil
 Marlin Superette
 Bell Films

John Thomas
J. Thomas Company
Baker Investments
Bell Investments
Saippuakauppia, Inc.
United States Video Distributors

3. Dolores Alexander was Ferris Alexander's spouse and the nominee director, owner, operator and proprietor, of the following business entities:

Ymparinen, Inc.	Kumantot, Inc.
Yot Mo, Inc.	Utot, Inc.
Haista Paska, Inc.	Bulbul, Inc.
a/k/a Haista Pasta, Inc., Haistpka, Corp.	
Video Hits	Kilikili, Inc.
Video Hits, (Corp.)	Karjalanpiirakka, Inc.
Northern Hotel	Hammaslaakarin-
Lipeakala, Inc.	matkastanne, Inc.

4. Wanda Magnuson was Ferris Alexander's bookkeeper and maintained the books and records of all of Ferris Alexander's business entities from about 1970 to the present.

5. Randall D. B. Tigue was an attorney Ferris Alexander hired to perform services for Ferris Alexander and his business entities, nominees and employees.

THE OFFENSE

6. Beginning on or about 1969, the exact date being unknown to the Grand Jury, and continuing to the present time, within the District of Minnesota, the defendants,

FERRIS JACOB ALEXANDER, SR.,
DOLORES ALEXANDER,
WANDA MAGNUSON, and
RANDALL D. B. TIGUE,

hereinafter called defendants, together with each other and with others known and unknown to the Grand Jury, did unlawfully, knowingly and willfully conspire, combine, confederate and agree together and with each other to defraud the United States of America by impeding, impairing, obstructing and defeating the lawful governmental functions of the IRS of the Treasury Department of the United States in the ascertainment, computation, assessment, and collection of the revenue, to wit: the concealment of the true sources, amounts, and disposition of income received by Ferris Jacob Alexander, Sr.

OBJECT OF THE CONSPIRACY

7. The object of the conspiracy was to defraud the United States of America by impeding, impairing, obstructing and defeating the lawful governmental functions of the IRS of the Treasury Department of the United States by concealing the amount and disposition of income, the true ownership, control, management, operation, and sources of funds used to acquire and expand the businesses of Ferris Alexander as set out in paragraph two above. As a result, verification by the IRS of the true income and expenses required to be reported by particular persons, entities, businesses and corporations was hindered, impeded, impaired, obstructed and defeated.

MEANS AND METHODS

8. The unlawful conspiracy was to be accomplished by the following means and methods:

A. the formation of corporations by and in the names of persons other than Ferris Alexander for the purpose of conducting Ferris Alexander's businesses;

B. the operation of Ferris Alexander's businesses in an unincorporated form under names other than Ferris Alexander;

C. the preparation and filing with the IRS of (1) false income tax returns for Ferris Alexander's employees; (2) false employer's quarterly federal tax returns and employer's annual federal unemployment tax returns in the names of Ferris Alexander's employees; (3) false corporate income tax returns; and (4) false income tax returns for Ferris Alexander and Delores Alexander.

D. the maintenance of inadequate, incomplete, and false books and records for the business entities;

E. the use of false State of Minnesota employer accounts;

F. the preparation and filing of false use and sales tax reports with the State of Minnesota by using the names of employees of Ferris Alexander as owners of the businesses;

G. the preparation and filing of false use and sales tax reports with the State of Minnesota;

H. the negotiation of business income in the form of checks in such a manner as to effectively convert it to cash prior to its disposition;

I. the diversion of business income through the use of cashiers checks and money orders, purchased with undeposited business income and the use of third party checks and cash, to pay personal and business expenses and to acquire assets;

J. the purchase of cashiers checks utilizing false names as the purchaser (remitter) and payee of such checks;

K. the diversion of business income to members of Ferris Alexander's family by depositing the money to their bank accounts;

L. the use of false Social Security account numbers.

OVERT ACTS

9. In furtherance of the conspiracy the defendants performed the following overt acts.

A. Kenneth LaLonde Enterprises-Robert J. Milavetz 1959-1976

(1) From at least on or about 1959 and continuing up to about 1976, the defendant, Ferris Alexander, conducted his business operations under the nominee name of Kenneth LaLonde Enterprises.

(2) From at least on or about 1959 to about 1976, Ferris Alexander employed Kenneth LaLonde, LeRoy

Wendling, and Benedict Jochim and others as clerks under the nominee name Kenneth LaLonde Enterprises.

(3) From at least on or about 1959 to about 1976, Ferris Alexander used a Kenneth LaLonde Enterprises checking account number 3008-318, opened November 19, 1959, at the First National Bank, St. Anthony Falls Office, to pay ~~his~~ employees and he directed Kenneth LaLonde to sign these payroll checks.

(4) From at least on or about 1969 to about 1976, the wage and tax statements (W-2) of the employees of Ferris Alexander were reported to the IRS under the employer name Kenneth R. LaLonde.

(5) From at least on or about 1970 to 1976, Wanda Magnuson maintained the books and records of Ferris Alexander's businesses under the name LaLonde Enterprises.

(6) From at least on or about 1970 to 1976 the employees of Ferris Alexander were reported to the Minnesota Department of Manpower Services as employees of Kenneth R. LaLonde Enterprises, Kenneth R. LaLonde, owner-employer.

(7) From at least on or about 1970 to 1976, in response to unemployment claims by his employees, Ferris Alexander provided Kenneth LaLonde with an attorney and instructed Kenneth LaLonde to appear at hearings of the Minnesota Department of Manpower Services posing as the owner of LaLonde Enterprises.

(8) On or about 1970, Ferris Alexander hired Robert J. Milavetz (hereinafter Milavetz) as his agent and partner

to purchase business property and to represent his employees working under the name LaLonde Enterprises.

(9) On January 2, 1970, Milavetz prepared and Ferris Alexander and Edwin Magnuson executed Articles of Incorporation for Bell Printing, Inc..

(10) From 1970 to 1974, Ferris Alexander paid Milavetz's fees to represent employees including Kenneth LaLonde, Benedict Jochim and LeRoy Wendling on charges of exhibiting obscene material.

(11) On February 24, 1970, Milavetz signed a purchase agreement for the American Theatre Building and adjacent Space Cleaners Store and paid \$1,500.00 of Ferris Alexander's money down.

(12) On April 1, 1970, Milavetz signed a purchase agreement for the Empress Theatre, and paid \$10,000.00 of Ferris Alexander's money down on the property.

(13) On April 9, 1970, Milavetz acting as the incorporator and the director formed the following corporations and on April 10, 1970 filed the Articles of Incorporation for them with the Secretary of State of Minnesota: (1) East Lake Cinema Corporation; (2) East Lake Properties, Inc.; (3) Empress Theatre, Inc.; (4) West Broadway Properties, Inc.

(14) On April 17, 1970, Milavetz executed a contract for deed in the name of East Lake Properties, Inc. for the purchase of the American Theatre property at 14-18 East Lake Street.

(15) On July 31, 1970, Milavetz' associate prepared Articles of Incorporation which were signed by Edwin

Magnuson, for the Franklin Theatre Corporation which then purchased the Franklin Theatre for Ferris Alexander.

(16) On or about January 12, 1971, Milavetz, acting with Edward Jacob Alexander on Ferris Alexander's behalf, purchased the stock of Grove Press, Inc. which owned the Rialto Theatre.

(17) On May 19, 1971, Milavetz drafted and witnessed the execution of a warranty deed transferring title of the Franklin Theatre from the Franklin Theatre Corporation to Ferris Alexander.

(18) On September 10, 1971, Milavetz prepared and had David Bourn execute as owner, an application for a theater license to the City of Minneapolis for the Rialto Theater.

(19) On or about October 14, 1971, Milavetz, on behalf of Ferris Alexander, prepared and had David Bourn execute, a supplemental application for a theater license for the Rialto Theater falsely representing that if he were granted the license he would purchase the theater business and lease its premises and fixtures.

(20) On or about January 26, 1972, Ferris Alexander hired Milavetz to sue the City of Minneapolis in the name of David Bourn.

(21) On or about September 7, 1972, Ferris Alexander hired Milavetz to file a lawsuit against the IRS seeking to prevent the IRS from collecting income taxes from Kenneth LaLonde due from the operation of Ferris Alexander's businesses conducted under the name of LaLonde Enterprises.

(22) On or about March 22, 1973, Ferris Alexander hired Milavetz to represent Benedict Jochim concerning his arrest for selling tickets to Deep Throat.

(23) On or about March 25, 1973, Milavetz prepared for execution by Benedict Jochim applications for licenses for the Franklin Theater, the Empress Theater and the Rialto Theatre and Benedict Jochim executed the applications.

(24) On or about April 6, 1973, Milavetz prepared and Jochim executed, an application for a license for the American Theater and then they executed a letter setting out the legal name of the owner of the real property for the theaters as listed in the Hennepin County Register of Deeds but not revealing unregistered transactions giving Ferris Alexander and his nominees an ownership interest in the property.

(25) Ferris Alexander's accountant, John Lester, prepared Kenneth LaLonde's income tax returns for 1974 through 1977 on which some of Ferris Alexander's income was falsely reported and he prepared LaLonde's 1978 return falsely reporting LaLonde as an employee of LeRoy Wendling.

(26) Wanda Magnuson prepared LaLonde's 1979 and 1980 tax returns and falsely reported that LaLonde was an employee of LeRoy Wendling.

(27) On or about August 20, 1980, a motion for release of bail was filed in Hennepin County District Court on behalf of Kenneth LaLonde Enterprises, attached to which was an affidavit bearing the forged signature of Kenneth LaLonde.

B. FUMYA, Inc. and KIMYBA, Inc. - 1976-1977

(28) On or about September 27, 1976, at the direction of Randall D. B. Tigue, Kenneth LaLonde executed Articles of Incorporation for FUMYA, Inc. whose address was the Rialto Theater, and KIMYBA, Inc. whose address was the Franklin Theater.

(29) On September 29, 1976, LaLonde applied for a license to operate the Empress and Franklin Theaters for KIMYBA, Inc.

(30) On September 29, 1976, Kenneth LaLonde applied for a license to operate the Rialto I & II Theaters for FUMYA, Inc.

(31) On December 17, 1976, Benedict Jochim applied for a license to operate the Adonis Theater for FUMYA, Inc.

(32) From on or about September 1976 to on or about April 1977, Ferris Alexander's employees were paid through FUMYA, Inc. and KIMYBA, Inc., checking accounts 3020-032 and 3020-040, with LeRoy Wendling as the authorized signer for said accounts.

C. LeRoy Wendling - 1972-1981

(33) On or about April 1972, LeRoy Wendling at the direction of Ferris Alexander moved from Minneapolis, Minnesota to Duluth, Minnesota to manage the Strand Theater.

(34) On or about 1973, Ferris Alexander instructed Wendling to apply for a license to operate the Strand Theater in Wendling's name.

(35) From on or about 1970 to 1976, Wendling, while employed by Ferris Alexander was paid as an employee of LaLonde Enterprises.

(36) On or about 1976, Randall D. B. Tigue and Ferris Alexander told Wendling that they wanted to use Wendling's name as the nominee owner of Ferris Alexander's businesses and Wendling agreed.

(37) On or about July 1976, Ferris Alexander instructed Wendling to obtain a signature stamp of his name, "LeRoy Wendling", which was done and this signature stamp was provided to Ferris Alexander and thereafter it was used to sign checks and other business documents related to Ferris Alexander's businesses.

(38) On or about April 1977, a checking account 602-3218-727 was opened in the name of LeRoy Wendling at the First National Bank of Minneapolis by Ferris Alexander.

(39) During the years 1977, 1978, and 1979, the expenses of Ferris Alexander's businesses were paid using checks signed with the signature stamp of LeRoy Wendling, drawn on the account number 602-3218-727.

(40) On or about May 22, 1977, a Report to Determine Liability for Unemployment Insurance was prepared in Wendling's name and signed with his signature stamp which falsely represented that Wendling was 100% owner of the following businesses:

Theatres: No. workers - 26

Adonis Theatre	904 Hennepin Ave.	Minneapolis
American Theatre	904 Hennepin Ave.	Minneapolis
Capitol Theatre	1077 Payne Ave.	St. Paul
Empress Theatre	412 W. Broadway	Minneapolis
Franklin Theatre	1021 E. Franklin	Minneapolis
Rialto Theatres	1&2 735 E. Lake St.	Minneapolis
Strand Theatre	16 E. Superior St.	Duluth

Bookstores: No. workers - 30

624 Hennepin Ave.	Minneapolis
741 East Lake St.	Minneapolis
343 East Lake St.	Minneapolis
401 1/2 East Hennepin	Minneapolis
429 Hennepin Ave.	Minneapolis
117 East Superior St.	Duluth
123 East Superior St.	Duluth
328 South Broadway	Rochester
463 Wabasha St.	St. Paul
471 Wabasha St.	St. Paul
621 University Ave.	St. Paul
550 Rice Street	St. Paul

It was further falsely represented that LeRoy Wendling acquired the entire business of the predecessors KIMYBA and FUMYA Corporations and LaLonde Enterprises.

(41) On or about June 6, 1977, an application for a City of Duluth sales and use tax permit was filed for the Bookstore, 117 East Superior Street, Duluth, Minnesota 55802, signed with Wendling's signature stamp.

(42) On or about August 10, 1979, a form signed with Wendling's signature stamp was filed with the Minnesota Department of Employment Security which falsely represented that Wendling had acquired Joey's Books, 315 Broadway Avenue, Rochester, Minnesota.

(43) On or about September 26, 1979, a form was filed with the Minnesota Department of Employment Security falsely representing that on January 1, 1979 Wendling as owner had acquired Express Entertainment d/b/a the Gopher Theatre.

(44) On or about November 26, 1979, an application for a City of Duluth sales and use tax permit was filed for the Strand Theatre in Wendling's name and was signed with his signature stamp.

(45) On or about February 11, 1978, Wendling had H&R Block prepare his 1977 income tax return reporting wages of \$15,600 paid by Wendling and KIMYBA, which return was filed with the IRS.

(46) On or about February 1978, Ferris Alexander and Tigie instructed Wendling that Wendling's tax returns would be handled by Wanda Magnuson and Ferris Alexander and Wendling took his H&R Block tax records to Ferris Alexander's office.

(47) On or about April 14, 1978, Ferris Alexander's accountant, John Lester, prepared an amended 1977 tax return in Wendling's name, which falsely included

income of Ferris Alexander for May 1, 1977 to December 31, 1977, and was signed with Wendling's signature stamp.

(48) On or about May 5, 1978, Ferris Alexander's accountant, John Lester, prepared corporate income tax returns for FUMYA and KIMYBA which falsely included income belonging to Ferris Alexander and which were signed with Wendling's signature stamp.

(49) From about 1978 to on or about October, 1980, the sales and use tax reports to the State of Minnesota for Ferris Alexander's businesses were submitted using Wendling's name.

(50) From on or about October, 1980, to on or about March, 1981, the Minnesota Consolidated Sales and Use Tax Returns for Ferris Alexander's businesses was reported under the alias name John Thomas.

(51) From about 1977 to about 1980, the Employer Quarterly Federal Tax Returns (Forms 941) and the Employer Annual Federal Unemployment Tax Returns (Forms 940) for Ferris Alexander's businesses were filed using the name LeRoy Wendling.

(52) On April 11, 1979, Wendling's federal income tax return for 1978 was prepared by John Lester and it falsely included income of Ferris Alexander and was signed with Wendling's signature stamp.

(53) On April 15, 1980, Wendling's federal income tax return for 1979 was prepared by Wanda Magnuson and it falsely included income of Ferris Alexander and was signed with Wendling's signature stamp.

(54) On or about October 1, 1980, LeRoy Wendling was terminated from employment by Ferris Alexander.

(55) On October 17, 1980, the alias name of John Thomas was added to the checking account in Wendling's name at the First National Bank of Minneapolis.

(56) On or about October 24, 1980, Ferris Alexander, using the alias John Thomas on behalf of the J. Thomas Company, represented to the Minnesota Department of Employment Services that LeRoy Wendling was only a manager of businesses run in his name and received only his weekly salary as compensation and that LeRoy Wendling had no ownership interest in the businesses and further represented that LeRoy Wendling had no ownership interest in the J. Thomas Company that took over the business on October 1, 1980.

(57) On November 2, 1981, in United States District Court, Ferris Alexander, while being examined under oath by Tigue, falsely testified that he had acquired the interests of LaLonde and Wendling in the bookstores at 429 and 624 Hennepin Avenue, in 1978 and 1979.

D. American Theatre Supply, Inc. - Express Entertainment Corporation 1975-1988

(58) On September 9, 1975, Articles of Incorporation were filed for American Theatre Supply, Inc., with Ferris Alexander, Jr. as the incorporator and director, and corporate offices located at the Flick Theater

(59) On December 16, 1975, stock was issued in American Theatre Supply, Inc. to Ferris Alexander (24,000) and his son Ferris Alexander, Jr. (1,000).

(60) On June 10, 1977, American Theatre Supply, Inc. purchased the Aster and Gopher Theatres for \$950,000.

(61) On June 17, 1977, Express Entertainment Corporation was formed with Rebecca Pencook as director and incorporator and she resigned on or about the same day.

(62) On August 11, 1977, Ferris Alexander executed, on behalf of American Theatre Supply, Inc., a quit claim deed for the Aster and Gopher Theatres to Express Entertainment Corporation.

(63) On or about June 9, 1979, the City of Minneapolis condemned property, including the Aster and Gopher Theatres, and paid a partial payment of \$1,075,875 for said property in 1979 and 1980, which payments represented income to Express Entertainment Corporation and Ferris Alexander and which income he failed to report to the IRS.

(64) On February 16, 1982, the City of Minneapolis made a final payment of \$386,325 for the Aster and Gopher Theatres, which payment was income to Express Entertainment Corporation and Ferris Alexander and which income he failed to report to the IRS.

(65) From May 6, 1981 to 1988, Ferris Alexander's businesses were reported on the Minnesota Sales and Use Tax reports under the name Express Entertainment, c/o Ferris Alexander.

E. Bell Films - 1983-1984

(66) During 1983 and 1984, at the direction of Ferris Alexander, Lee Oberg sold video tapes under the name of

Bell Films and the receipts from these sales were delivered to Ferris Alexander and Lee Oberg was paid in cash for his services by Ferris Alexander, who negotiated these receipts and on May 13, 1983 used the name John Thomas as an endorser.

F. The Odd Fellows Building-Ymparinen, Inc., - 1984-1989

(67) On October 23, 1984, Ferris Alexander transferred the Odd Fellows property from himself to Dolores Alexander.

(68) On October 24, 1984, Ferris Alexander purchased a \$50,000 cashier's check with a false remitter of Title Investment Co., Chicago, Illinois, and payable to the Odd Fellows Grand Lodge and Dolores Alexander.

(69) On October 27, 1984, Ferris Alexander used this \$50,000 check to purchase the Odd Fellows property.

(70) On or about December 27, 1984, In Seok Na, at Ferris Alexander and Tigues's direction, executed Articles of Incorporation for the following corporations, all with offices at the Odd Fellows Property:

Haista Paska, Inc.
Ymparinen Inc.
Kumantot, Inc.
Yot Mo, Inc.
Utot, Inc.
Kilikili, Inc.
Hammaslaakarinmatkastanne, Inc.
Karjalanpiirakka, Inc.
Lipeakala, Inc.
Bulbul, Inc.

(71) On or about January 6, 1985, In Seok Na resigned as director of all the corporations listed in the preceding paragraph and Dolores Alexander became their director.

(72) On January 10, 1985, The Articles of Incorporation for these ten corporations were filed with the Secretary of State of Minnesota with In Seok Na as their director.

(73) On January 10, 1985, ten corporate books and corporate seals were purchased from the St. Paul Stamp Works for these ten corporations and were paid for by A. B. Distributors in cash.

(74) On May 1, 1985, the deed from Ferris Alexander to Dolores Alexander and the deed from the Odd Fellows Lodge to Ferris Alexander, for the Odd Fellows property, were filed with the Hennepin County Recorder's Office.

(75) On May 3, 1985, Dolores Alexander transferred title of the Odd Fellows property to Ymparinen, Inc.

(76) On or about September 27, 1987, Ferris Alexander and Dolores Alexander through Tigie filed an amended complaint in Hennepin County District Court stating that Ferris Alexander paid the \$50,000 for the Odd Fellows property and stating that he subsequently deeded the building to Dolores Alexander, but not revealing the further transfer from Dolores Alexander to Ymparinen, Inc.

(77) On March 16, 1989, in United States District Court while testifying under oath and while being examined by Tigie, Ferris Alexander testified that his spouse, Dolores Alexander, owned the Odd Fellows property.

G. Video Hits-Haista Paska, Inc. - 1985-1989

(78) On or about May 29, 1985, the defendant Ferris Alexander purchased cashier's check number 112068 in the amount of \$19,500 with a payee of Video Hits and a remitter of Baker Investments and he used that cashier's check to purchase a video store business called Video Hits, located in Crystal, Minnesota.

(79) On or about June 19, 1985, Dolores Alexander applied to the Minnesota Department of Revenue for a Minnesota Tax Identification Number for Haista Paska, Inc. doing business as Video Hits.

(80) On or about June 19, 1985, Dolores Alexander opened a corporate business checking account at the First Bank Minneapolis, St. Anthony Falls Office, in the name of Haista Paska, Inc.

(81) On July 8, 1985, the IRS assigned Federal Employer Identification number 41-1523124 in response to an application to:

HAISTA PASKA, INC.

VIDEO HITS

5309 36th Avenue North, Crystal, Minnesota

4608 Ellerdale Road

Minnetonka, Minnesota 55345

(82) On September 25, 1986, Ferris Alexander negotiated cashier's check number 117467, dated September 2,

1986, in the amount of \$60,038.39 with a remitter of Bell Investments and a payee of Haistpka, Corp.

(83) On September 25, 1986, Ferris Alexander purchased cashier's checks, numbers 117926 and 117927 in the amount of \$32,000 and \$23,000 and check number 117927 had a remitter of Haistpka Corp. and a payee of Dolores Alexander.

(84) On September 26, 1986, Ferris Alexander, through Dolores Alexander as a nominee, purchased the property located at 216 East Third Street, Winona, Minnesota for \$50,000 using cashier's check 117927 as part payment and began to operate a Video Hits store at that location with merchandise supplied by A B Distributors.

(85) From 1985 to March 1988, the expenses of the Video Hits stores were paid with checks drawn on the Haista Paska, Inc. checking account.

(86) From 1985 through 1987, the Employer's Quarterly Federal Tax Returns for Video Hits employees were filed with the IRS under the name Haista Paska, Inc., Video Hits, using Federal Employer Identification No. 41-1523124.

(87) From 1985 to 1987, Wanda Magnuson maintained the books and records for Haista Paska, Inc., doing business as Video Hits.

(88) On or about December 11, 1987, Dolores Alexander filed with the IRS income tax returns for 1985 and 1986 and on April 15, 1988 she filed an income tax return for 1987 on each of which she reported Haista Paska, Inc. corporate income tax losses as non-corporate losses to offset other taxable income.

(89) On or about May 27, 1986, Ferris Alexander signed a purchase agreement for 13 and 15 East Superior Street, Duluth, Minnesota.

(90) On or about June 12, 1986, Tigie changed the name on the purchase agreement from Ferris Alexander to Dolores Alexander and mailed A B Distributors check 30165, for \$1,000.00 as down payment to the seller along with the purchase agreement signed by Dolores Alexander.

(91) On or about June 27, 1986, Dolores Alexander signed a contract for deed for 13 and 15 East Superior Street which was notarized by Wanda Magnuson.

(92) On or about July 17, 1986, First Bank cashier's check number 116967 for \$9,000.00 was purchased and was used to pay part of the purchase price for 13 and 15 East Superior Street.

(93) On or about October 8, 1986 to April 27, 1987, Haista Paska, Inc. account checks were used to pay the balance of the purchase price of the property located at 13 and 15 East Superior Street.

H. Northern Hotel-Yot Mo, Inc. - 1987-1988

(94) On March 30, 1987, Dolores Alexander as President of Yot Mo, Inc. signed a contract for deed prepared by Tigie for the purchase of the Northern Hotel by Yot Mo, Inc. from St. Germain Brothers, Inc. for \$20,000, with \$500 earnest money and \$8,000 due at closing and \$1500 per month payable on the balance.

(95) On April 6, 1987, the \$8,000 was paid to St. Germain Company, by Haista Paska, Inc. doing business as Video Hits, check number 2147, and the \$1,500.00 monthly contract payments from May, 1987 to December, 1987, from Yot Mo, Inc. to St. Germain Company were paid by Haista Paska, Inc., and were recorded in the Video Hits cash disbursement journal kept by Wanda Magnuson.

(96) During 1985, 1986, 1987 and 1988 Ferris Alexander made deposits to the Haista Paska, Inc., d/b/a/ Video Hits bank account, which deposits were in excess of the reported gross sales of Video Hits by \$257,845.87.

I. Business Receipts-Bank Transactions

(97) From 1970 to the present, A. B. Distributors served as the warehouse, main office location and supply house for the numerous business entities operated directly and indirectly by Ferris Alexander, and was located principally at 20 North 4th Street and 315 East Lake Street, Minneapolis, Minnesota.

(98) From 1970 to the present Ferris Alexander, Edward Alexander, Jeffrey Alexander, Benedict Jochim, and other key employees, picked up the receipts from Ferris Alexander's business entities and took those receipts to the main office.

(99) From 1970 to the present, Ferris Alexander, Edward Alexander and Jeffrey Alexander counted the receipts from these business entities.

(100) From on or about 1980 to on or about 1989, the defendant Ferris Alexander maintained and used bank accounts at various banks as follows:

<u>Bank</u>	<u>Account Name</u>	<u>Account Number</u>
First Bank - St. Anthony Falls	Ferris or Edward Alexander, American Book Wholesalers	706-2051-334
First Bank - St. Anthony Falls	A.B. Distributors	206-3023-374
First Bank - St. Anthony Falls	Marlin Gas & Oil Co.	206-3023-283
First Bank - St. Anthony Falls	United States Video	206-3023-622
First Bank - St. Anthony Falls	Marlin Superette	206-3025-080
First Bank - St. Anthony Falls	LeRoy Wendling/ American Theatre	602-3218-727
First Western State Bank	U.S. Video	000-42-093
First Western State Bank	A.B. Video	44-057
Marquette Bank - Lake Street	United States Video Distributors	102-7-176
Marquette Bank & Trust, Rochester	U.S. Video	2488-925
Marquette Bank & Trust, Rochester	Broadway Book Store	2389-625

Norwest Bank Duluth	Wabasha Book Store	0116-863
Norwest Bank Duluth	American Theater Supply a/k/a Gardner Hotel	116-848
First Bank Duluth	Ferris J. Alexander	1095-930
First Bank Duluth	U.S. Video	1096-635
Merchants Nat'l Bank of Winona	Ferris Alexander	25-873
First Bank Hopkins	Ferris J. Alexander	2318-022
Northwestern National Bank	Ferris J. Alexander	40-03-831
Northwestern National Bank	Ferris J. Alexander	6813-715
First State Bank of Saint Paul	United States Video, Inc. % A.B. Distributors	15-05-510
Metro Bank	Ferris J. Alexander	393-538
Norwest Bank - Nicollet/Lake	Ferris J. Alexander	2454-217
Merchants National Bank of Winona	Video Hits	7-173
First Bank - St. Anthony Falls	Haista Paska Inc. Video Hits	206-3027-052
First Bank - St. Anthony Falls	Dolores Alexander	706-2040-345

First Bank - St. Anthony Falls	Carolyn J. Alexander	706-2092-551
First Bank - St. Anthony Falls	Gus Alexander	706-2182-931
First Bank - St. Anthony Falls	Susan Alexander	706-2167-841
Union Bank & Trust Company	Ferris J. Alexander	207263400
Union Bank & Trust Company	Newspaper Club	101084400
Union Bank & Trust Company	Dolores Alexander	207246400
Union Bank & Trust Company	Video Hits	101085400
First Bank - St. Anthony Falls	Robin Alexander	706-2092-346
First Bank - St. Anthony Falls	Robin & Susan Alexander	706-2166-736

(101) Ferris Alexander performed banking transactions in the accounts listed in the previous paragraph with the receipts from his business entities and in doing so he commingled the funds from his various business entities and he deposited business receipts into his own personal account, the account of Dolores Alexander and the accounts of his children.

(102) From and during 1982 through 1984, Ferris Alexander purchased about \$6.3 million dollars of cashier checks and on some he used names other than his own, as remitter and payee including, James and Jim Peterson, Bob Olson, Bob Carlson, John Thomas, Jim Nelson, Paul

Saba, Pete Saba, Johnson Import, Bell Investment Company, Disabled Veterans #40, Title Investment Co.-Chicago, Ill., and Pat Kaner.

(103) During 1985 and 1986, Ferris Alexander purchased cashier's checks and used false remitters and payees in the names Bell Investment Company and Baker Investment Company.

(104) From and during 1982 through 1986, Ferris Alexander purchased about \$325,000.00 of money orders with undeposited business receipts and he and Wanda Magnuson used these money orders to pay personal and business expenses.

(105) On or about December 19, 1983, Ferris Alexander received a check in the amount of \$411,021.18 from the City of St. Paul as part payment for the sale of real estate and he negotiated said check at the Norwest Bank, St. Anthony Branch and he used some of that money to purchase cashier check 80497 with a remitter of Bell Investments and a payee of Anderson Cadillac, in the amount of \$25,000, which check was used to purchase a Cadillac.

(106) On November 3, 1988, Ferris Alexander opened two checking accounts at the Union Bank and Trust Company, one account for the "Newspaper Club", 315 East Lake Street and using the Federal Tax Number of A B Distributors and one account for Video Hits, 315 East Lake Street, using the Federal Tax Number of Haista Paska, Inc.

J. Income Tax Returns - 1981-1987

(107) Horace May prepared Ferris Alexander's 1982 and 1983 income tax returns based on information provided to him by Ferris Alexander and Wanda Magnuson.

(108) On June 6, 1983 and October 22, 1984, Ferris Alexander and Wanda Magnuson filed and caused to be filed income tax returns for Ferris Alexander for 1982 and 1983 which they knew did not accurately report the true sources and amounts of his income.

(109) On June 22, 1987, Ferris Alexander and Wanda Magnuson filed and caused to be filed an amended individual income tax return for Ferris Alexander for the tax year 1981, knowing it carried back losses from the false tax returns filed for 1982 and 1983.

(110) On or about February 25, 1985, Ferris Alexander and Wanda Magnuson prepared and filed a false Minnesota Consolidated Sales and Use Tax Return for January 1985.

(111) On or about April 15, 1986, April 15, 1987, August, 1987, and April 15, 1988, Ferris Alexander filed extensions of time to file income tax returns for tax years 1985, 1986, and 1987, which returns were never filed.

K. Paine Webber - 1971-1987

(112) From on or about 1965, to about 1988, Ferris Alexander maintained a brokerage account at Paine Webber, account number L045458 and used Social Security Account Number (SSAN) 348-12-0381, which was not his correct SSAN.

(113) On or about May 21, 1985, Ferris Alexander certified on a W-9 Form that his SSAN was 348-12-0381.

(114) On or about May 24, 1985, Ferris Alexander opened a new account number L010746 at Paine Webber using SSAN 348-12-0381.

L. Escrow and Trust Accounts - 1982-1983

(115) Tigie maintained an account number 317511-0 at the First Bank Minneapolis, entitled, Randall Tigie Escrow Account and on December 6, 1982 cashier's check number 102111 dated November 24, 1982 in the amount of \$10,000 with a payee of Ferris Alexander and remitter of Ferris Alexander and endorsed by Ferris Alexander was deposited into that account and no record of said payment was made by Randall D. B. Tigie in his escrow account records.

(116) On March 14, 1983 Tigie issued check number 1272 to Northern Construction Company and Clyde Olson in the amount of \$6200 from his trust account number 0260344, at First Bank Minneapolis, which check on March 15, 1983 was negotiated by Ferris Alexander. All in violation of Title 18, United States Code, Section 371.

COUNT II

On or about the 6th day of June, 1983, in the State and District of Minnesota, the defendant,

FERRIS JACOB ALEXANDER, SR.,

did willfully and knowingly make and subscribe, and cause to be made and subscribed, a document verified by

a written declaration that it was made under penalties of perjury, to-wit: a United States Individual Income Tax Return, Form 1040, for the calendar year 1982, which was filed with the Internal Revenue Service in the name of Ferris J. Alexander, 4608 Ellerdale Road, Minnetonka, Minnesota, and which said return he did not believe to be true and correct as to every material matter, in that the gross receipts reported on the Schedule C thereof were in the amount of \$3,647,824.00 whereas, the defendant then and there well knew and believed the total gross receipts were substantially in excess of that stated amount, that is about \$4,995,664.88; all in violation of Title 26, United States Code, Section 7206(1).

COUNT III

On or about the 22nd day of October, 1984 in the State and District of Minnesota, the defendant,

FERRIS JACOB ALEXANDER, SR.,

did willfully and knowingly make and subscribe, and cause to be made and subscribed, a document verified by a written declaration that it was made under penalties of perjury, to-wit: a United States Individual Income Tax Return, Form 1040, for the calendar year 1983, which was filed with the Internal Revenue Service in the name of Ferris J. Alexander, 4608 Ellerdale Road, Minnetonka, Minnesota, and which said return he did not believe to be true and correct as to every material matter, in that the gross receipts reported on the Schedule C thereof were in the amount of \$4,038,290.00, whereas, the defendant then and there well knew and believed the total gross receipts were substantially in excess of that stated amount, that is

about \$5,499,281.70; all in violation of Title 26, United States Code, Section 7206(1).

COUNT IV

At all time material to this Indictment:

THE ENTERPRISE

1. The defendants,

FERRIS JACOB ALEXANDER, SR.,
DOLORES ALEXANDER,
JEFFREY ALEXANDER, and
WANDA MAGNUSON,

together with each other and doing business as corporations, individuals, companies, partnerships, affiliates, joint venturers, associates, nominees, (hereinafter called business entities),

A. Those business entities being as follows:

A B Distributors
American Book Wholesalers
A B Video
Kenneth LaLonde Enterprises
East Lake Properties, Inc.
East Lake Cinema Corporation
West Broadway Properties, Inc.
Empress Theatre, Inc.
American Book Store
American Theatre
Empress Theatre, Minneapolis, MN
Franklin Theatre Corporation
Lake Street Properties, Inc.
Rialto Theatre, Minneapolis, MN
Rialto Theatre I & II, Minneapolis, MN

Strand Theatre, Duluth, MN
Capitol Theatre, St. Paul, MN
The Flick, Minneapolis, MN
The Flick, St. Paul, MN
Wabasha Book Store, St. Paul, MN
KIMYBA, Inc.
FUMYA, Inc.
LeRoy Wendling
A-Z Bookstore, Duluth, MN
Gopher Theatre, Minneapolis, MN
Aster Theatre, Minneapolis, MN
Express Entertainment Corporation
Express Entertainment
Bell Printing, Inc.
U.S. Video
The Lake Street Bookstore, Minneapolis, MN
The Adult Entertainment Center, Minneapolis, MN
Chicago-Lake Bookstore, Minneapolis, MN
American/Empress Theatre & Bookstore, Minneapolis, MN
Nicola's Bookstore, Minneapolis, MN
East Hennepin Video Book & Theatre, Minneapolis, MN
Broadway Book No. 1, Rochester, MN
Broadway Book No. 2, Rochester, MN
Joey's Adult Book, Rochester, MN
Wabasha Adult Bookstore, Duluth, MN
Ultimate Book Store, Winona, MN
Video Hits, Winona, MN
Video Hits, Crystal, MN
American Theatre Supply Co., Inc.
Yot Mo, Inc.
Haista Paska, Inc., a/k/a Haista Pasta, Inc., Haistpka Corp.
Ymparinen, Inc.
Lipeakala, Inc.

Kumantot, Inc.
 Utot, Inc.
 Bulbul, Inc.
 Kilikili, Inc.
 Karjalanpiirakka, Inc.
 Hammaslaakarinmatkastanne, Inc. Gardner
 Hotel, Duluth, MN
 Northern Hotel, Duluth, MN
 Newspaper Club
 Superior Street Company
 Marlin Gas and Oil
 Marlin Superette
 Bell Films
 John Thomas
 J. Thomas Company a/k/a John Thomas Co.
 Baker Investments
 Bell Investments
 Saippukauppias, Inc.
 United States Video Distributors

and others known and unknown to the Grand Jury, being persons employed by and associated with the above individuals, corporations and business entities, constituted an enterprise as defined by Title 18, United States Code, Section 1961(4) that is, a group of individuals and corporations associated in fact although not a legal entity, the activities of which affected interstate commerce, and which engaged in and whose leaders, members and associates operated and engaged in various unlawful activities in the State and District of Minnesota and elsewhere, including the transportation in interstate commerce for the purpose of the sale and distribution of obscene, lewd, lascivious and filthy books, pamphlets, pictures, films, papers, letters, writing, prints, silhouettes, drawings, figures, images, casts, and other articles capable of

producing sound, and other matters of indecent and immoral character, which are in violation of Title 18, United States Code, Section 1465, as listed and charged in this indictment as predicate offenses.

PURPOSE OF THE ENTERPRISE

2. The purposes of the enterprise included:

A. the interstate transportation for the purpose of sale and distribution of obscene video tape movies and magazines, as listed and charged in this indictment as predicate offenses, the object of which was to obtain money for the members of the enterprise;

B. the concealment of the true identities of the owners and operators of the enterprise;

C. the distribution of the income, proceeds and property of the enterprise, directly and indirectly, so as to hide the source and to benefit the defendants in the form of cash, cashier checks, money orders, salaries, dividends, interest payments and the payment of personal living expenses;

D. the acquisition of real estate in nominee names to hide the true ownership and to conceal the disposition of the proceeds of the enterprise;

E. the acquisition of real estate for the purpose of distributing obscene, lewd, lascivious and filthy books, pamphlets, pictures, films, papers, letters, writing, prints, electrical transcriptions, images, and other articles capable of producing sound and other matters of indecent and immoral character.

MEANS AND METHODS OF THE ENTERPRISE

3. Among the means and methods by which the defendants and others known and unknown to the Grand Jury, conducted and participated in the conduct of affairs of the enterprise, were the allegations of paragraph 8(A) through (L) of Count I of this indictment which are realleged as if set forth fully herein and the following:

A. Ferris Alexander was the owner and operator directly and indirectly through nominees of all of the business entities and as such it was his responsibility to:

(1) direct the day to day operation of the enterprise and to make and participate in all the major decisions concerning the enterprise;

(2) facilitate, select, order and pay for the interstate transportation for distribution of obscene video tape cassettes, obscene magazines, and other matter of an indecent and immoral character;

(3) recruit and cause to be recruited individuals to falsely identify themselves as the owners, proprietors and operators of the business entities as part of a scheme and artifice to hide the true identities of the actual owners, in an attempt to insulate himself from criminal liability for obscenity and income tax and sales and use tax reporting;

(4) recruit and cause to be recruited individuals to falsely identify themselves as the incorporator and director of the following corporations:

Fumya, Inc.;
 Kimyba, Inc.;
 Yot Mo, Inc.;
 Haista Paska, Inc.;

Ymparinen, Inc.;
 Lipeakala, Inc.;
 Kumantot, Inc.;
 Utot, Inc.;
 Bulbul, Inc.;
 Kilikili, Inc.;
 Karjalanpiirakka, Inc.;
 Hammaslaakarinmatkastanne, Inc.;
 Saippukauppias, Inc.

(5) collect, count, and supervise the collection and counting of the receipts of the enterprise;

(6) determine, order and execute the financial transactions of the enterprise, including bank transactions, so as to impede and impair the ascertainment and collection of federal income tax;

(7) hire and fire employees of the enterprise and determine the payment of wages and salaries;

(8) provide for legal representation of employees charged with offenses stemming from and arising out of their employment in the enterprise and as to their liability for income taxes;

(9) purchase and sell, and negotiate the purchase, sale and condemnation of real property owned by and in the name of the individuals, corporations and other entities which comprised the enterprise and which property was used to conduct the activity and business of the enterprise and which property constituted, and was derived from proceeds obtained directly and indirectly from the activity of the enterprise;

(10) enter into contracts, leases, loan agreements and other transactions for and on behalf of the defendants and entities comprising the enterprise.

B. Wanda Magnuson was the bookkeeper for the enterprise and it was her responsibility to:

(1) participate with Ferris Alexander in the direction of the day-to-day operations of the enterprise;

(2) keep the books and records of the enterprise;

(3) prepare and notarize documents used to operate the enterprise;

(4) provide information to tax return preparers on behalf of Ferris Alexander, Dolores Alexander and the various business entities;

(5) prepare and file federal and state income, employment and sales and use tax reports for the enterprise.

C. Jeffrey Alexander, the son of Ferris Alexander, was the Vice President of A B Distributors and a manager and supervisor of the enterprise. It was his responsibility to:

(1) provide assistance to Ferris Alexander with respect to the activities set forth in paragraph 3(A) of Count IV which are realleged as if set forth fully herein;

(2) direct and participate in the day to day operation of the enterprise and to participate in the execution of decisions concerning its operation;

(3) give orders and directions to employees and associates of the enterprise;

(4) collect, count and deposit the receipts of the enterprise.

D. Dolores Alexander was a manager and supervisor of the enterprise. It was her responsibility to:

(1) act as the nominee director, owner, operator and proprietor of the following business entities:

Ymparinen, Inc.
Haista Paska, Inc.
Yot Mo, Inc.
Video Hits, (Corp.)
Video Hits
Northern Hotel
Lipeakala, Inc.
Kumantot, Inc.
Utot, Inc.
Bulbul, Inc.
Kilikili, Inc.
Karjalanpiirakka, Inc.
Hammaslaakarinmatkastanne, Inc.

(2) to participate in the operation of the enterprise by the execution of decisions concerning its operation;

(3) to give orders and directions to employees and associates of the enterprise;

(4) to execute documents for the purpose of conducting the enterprise.

THE OFFENSE

4. From at least on or about 1969 and continuing thereafter, up to and including the date of this indictment, in the State and District of Minnesota and elsewhere, the defendants,

FERRIS JACOB ALEXANDER, SR.,
DOLORES ALEXANDER,
JEFFREY ALEXANDER, and
WANDA MAGNUSON,

and others known and unknown to the Grand Jury, being persons employed by and associated with the above-described criminal enterprise, did unlawfully, willfully and knowingly combine, conspire, confederate and agree with each other to commit an offense against the United States in violation of Title 18, United States Code, Section 1962(c), that is, to conduct and participate, directly and indirectly, in the conduct of the affairs of the criminal enterprise through a pattern of racketeering activity, as defined in Title 18, United States Code, Sections 1961(1) (B) and 1961(5), as set forth below.

THE PATTERN OF RACKETEERING ACTIVITY

5. The pattern of racketeering activity committed by the defendants consisted of multiple acts of interstate transportation of obscene material indictable under Title 18, United States Code, Section 1465, and consisted of the following acts:

Racketeering Act 1

The grand jury realleges Count VII of this indictment, relating to the video tape movie "Ass Master, Volume I", the commission of said count constitutes the commission of Racketeering Act 1.

Racketeering Act 2

The grand jury realleges Counts VIII and IX of this indictment, relating to the video tape movie "Bi and Beyond", the commission of either of said counts alone constitutes the commission of Racketeering Act 2.

Racketeering Act 3

The grand jury realleges Count X of this indictment relating to the video tape movie "Big Bad Bertha", the commission of said count constitutes the commission of Racketeering Act 3.

Racketeering Act 4

The grand jury realleges Counts XI, XII, XIII and XIV of this indictment, relating to the video tape movie "Knights in White Satin", the commission of any one of said counts alone constitutes the commission of Racketeering Act 4.

Racketeering Act 5

The grand jury realleges Counts XV, XVI, XVII, XVIII and XXI of this indictment, relating to the magazine *The Fat Book*, the commission of any one of said counts alone constitutes the commission of Racketeering Act 5.

Racketeering Act 6

The grand jury realleges Counts XX, XXI and XXII of this indictment, relating to the magazine *Leather Sleaze*,

the commission of any one of said counts alone constitutes the commission of Racketeering Act 6.

Racketeering Act 7

The grand jury realleges Counts XXIII, XXIV and XXV of this indictment, relating to the magazines *Let's Have A Fuck Party* and *Women Who Need Powerful Men*, the commission of any one of said counts alone constitutes the commission of Racketeering Act 7.

Racketeering Act 8

The grand jury realleges Counts XXVI and XXVII of this indictment, relating to the magazine *Sweet Ass*, and further alleges that on or about the dates indicated below the defendants for the purpose of sale and distribution, knowingly transported in interstate commerce to the District of Minnesota said magazine,

<u>Date Transported</u>	<u>Quantity</u>
November 6, 1983	1
November 13, 1983	100
February 16, 1984	1
March 1, 1984	25
May 3, 1984	1
May 21, 1984	50

and the commission of either count alone or any one of the transportations listed alone constitutes the commission of Racketeering Act 8.

Racketeering Act 9

The grand jury realleges Count XXVIII of this indictment, relating to the magazine *Taboo II*, the commission of said count constitutes the commission of Racketeering Act 9.

Racketeering Act 10

The grand jury realleges Count XXIX of this indictment, relating to the video tape movie "The Lusty Adventurer", the commission of said count constitutes the commission of Racketeering Act 10.

Racketeering Act 11

The grand jury realleges Counts XXXII and XXXIII of this indictment, relating to the video tape movie, "She Male Encounters #3", and further alleges that on or about the dates indicated below the defendants, for the purpose of sale and distribution knowingly transported in interstate commerce to the District of Minnesota said video tape movie:

<u>Dated Transported</u>	<u>Quantity</u>
May 20, 1982	15
May 21, 1982	15
January 25, 1984	10
January 31, 1984	2

and the commission of either count alone or any one of the transportations listed alone constitutes the commission of Racketeering act 11.

OVERT ACTS

6. In furtherance of the conspiracy and to achieve the objects thereof, the defendants and co-conspirators performed overt acts in the District of Minnesota and elsewhere including, but not limited to:

A. On or about March 1969, within the Southern District of New York, the defendant Ferris Alexander did conspire to transport in interstate commerce for the purpose of sale and distribution, obscene matter, to-wit: 10,000 copies of *Adam and Eve* and 10,000 copies of *Kiss It Hard*.

B. The allegations contained in paragraph 9A through L of Count I of this indictment are hereby realleged as if fully set forth herein.

C. On or about the dates indicated below, the defendants sold the listed obscene magazines and video tape movies:

<u>Date Sold</u>	<u>Location</u>	<u>Title</u>	<u>Type</u>
3/25/88	Joey's Bookstore 315 South Broadway Rochester, MN	"Ass Masters"	Video Tape Movie
3/22/88	Wabasha Adult Bookstore, 15 East Superior St. Duluth, MN	"Ass Masters"	Video Tape Movie
2/22/88	The Chicago-Lake Bookstore 741 East Lake Street Rochester, MN	"Bi and Beyond"	Video Tape Movie
3/25/88	Broadway Book II 319 South Broadway Minneapolis, MN	"Big Bad Bertha"	Video Tape Movie
3/10/89	Video Hits 5309 36th Ave. No. Crystal, MN	"Collection, Volume #3"	Video Tape Movie
12/14/88	Nicola Bookstore 2938 Lyndale Minneapolis, MN	<i>The Fat Book</i>	Magazine

<u>Date Sold</u>	<u>Location</u>	<u>Title</u>	<u>Type</u>
12/14/88	East Hennepin Bookstore 401 East Hennepin Ave. Minneapolis, MN	<i>The Fat Book</i>	Magazine
3/25/88 and 12/14/88	Lake Street Bookstores (4th & Lake) 343 East Lake Street Minneapolis, MN	<i>The Fat Book</i>	Magazine
4/25/88	Video Hits 216 East 3rd St. Winona, MN	"Knights in White Satin"	Video Tape Movie
2/28/89	Adult Entertainment Center 420 Hennepin Ave. Minneapolis, MN	<i>Leather Sleaze</i>	Magazine
3/25/88 and 12/14/88	Flick Theater 623 University Ave. W. St. Paul, MN	<i>Leather Sleaze</i>	Magazine

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<u>Date Sold</u>	<u>Location</u>	<u>Title</u>	<u>Type</u>
12/14/88	The Lake Street Bookstore 343 East Lake Street Minneapolis, MN	<i>Leather Sleaze</i>	Magazine
12/14/88	East Hennepin Bookstore 401 East Hennepin Ave. Minneapolis, MN	<i>Leather Sleaze</i>	Magazine
3/10/89	The Chicago-Lake Bookstore 741 East Lake St. Minneapolis, MN	<i>Let's Have a Fuck Party</i>	Magazine
3/10/89	Video Hits 5309 36th Ave. No. Crystal, MN	"The Lusty Adventurer"	Video Tape Movie
12/14/88	Adult Entertainment Center 420 Hennepin Ave. Minneapolis, MN	"She Male Encounters #3"	Video Tape Movie

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<u>Date Sold</u>	<u>Location</u>	<u>Title</u>	<u>Type</u>
3/10/89	The Chicago-Lake Bookstore 741 East Lake St. Minneapolis, MN	<i>Sweet Ass</i>	Magazine
3/24/89	Wabasha Books 15 E. Superior St. Duluth, MN	<i>Sweet Ass</i>	Magazine
3/25/88	Broadway Book I 328 South Broadway Rochester, MN	<i>Taboo II</i>	Magazine
4/25/88	Ultimate Bookstore 227 East Third Winona, MN	<i>Women Who Need Powerful Men</i>	Magazine

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all in violation of Title 18, United States Code, Section 1962(d).

COUNT V

1. The introductory paragraphs 1, 2 and 3 of Count IV and the allegations of paragraphs 9A through L of Count I of this indictment are realleged as if set forth fully herein.

2. From on or about 1969, and continuously thereafter, up to and including the date of this indictment, in the State and District of Minnesota and elsewhere, the defendants,

FERRIS JACOB ALEXANDER, SR.,
DOLORES ALEXANDER,
JEFFREY ALEXANDER, and
WANDA MAGNUSON,

and others known and unknown to the Grand Jury, being persons employed by and associated with the above-described criminal enterprise, did participate as principals within the meaning of Title 18, United States Code, Section 2, in a pattern of racketeering activity, as defined by Title 18, United States Code, Sections 1961(1)(B) and 1961(5), which consisted of the racketeering acts one through eleven set out in paragraph five of Count IV, which are realleged and incorporated by reference as though fully set forth herein, and the defendants having received income derived directly and indirectly from the aforesaid pattern of racketeering activity, did knowingly and intentionally use and invest, directly and indirectly, the aforesaid income and parts of such income and the proceeds of such income, in the establishment and operation of the enterprise, which enterprise engaged in and the activities of which affected interstate commerce; all in

violation of Title 18, United States Code, Sections 1962(a) and 2.

COUNT VI

1. The introductory paragraphs 1, 2 and 3 of Count IV and the allegations of paragraphs 9A through L of Count I of this indictment are realleged as if set forth fully herein.

2. From on or about 1969, and continuing thereafter, up to and including the date of this indictment, in the State and District of Minnesota and elsewhere, the defendants,

FERRIS JACOB ALEXANDER, SR.,
DOLORES ALEXANDER,
JEFFREY ALEXANDER, and
WANDA MAGNUSON,

and others known and unknown to the Grand Jury, being persons employed by and associated with the above-described criminal enterprise, did unlawfully, willfully, and knowingly conduct and participate, directly and indirectly, in the conduct of the affairs of said enterprise, which engaged in and the activities of which affected interstate commerce, through a pattern of racketeering activity, as defined by Title 18, United States Code, Section 1961(1)(B) and 1961(5), which consisted of the racketeering acts one through eleven set out in paragraph five of count IV, which are realleged and incorporated by reference as if set forth fully herein; all in violation of Title 18, United States Code, Section 1962(c).

COUNT VII

On or about November 30, 1987, the defendants,

FERRIS JACOB ALEXANDER, SR.,
DOLORES ALEXANDER,
JEFFREY ALEXANDER, and
WANDA MAGNUSON,

knowingly transported in interstate commerce to the District of Minnesota for the purpose of sale and distribution, obscene, lewd, lascivious, and filthy films, figures, images, casts, electrical transcriptions and other articles capable of producing sound and other matters of indecent and immoral character, that is, 100 copies of:

"Ass Masters, Volume I," a video tape movie;
all in violation of Title 18, United States Code, Sections 1465 and 2.

COUNT VIII

On or about January 22, 1988, the defendants,

FERRIS JACOB ALEXANDER, SR.,
DOLORES ALEXANDER,
JEFFREY ALEXANDER, and
WANDA MAGNUSON,

knowingly transported in interstate commerce to the District of Minnesota for the purpose of sale and distribution, obscene, lewd, lascivious, and filthy films, figures, images, casts, electrical transcriptions and other articles capable of producing sound and other matters of indecent and immoral character, that is, 30 copies of:

"Bi and Beyond," a video tape movie;
all in violation of Title 18, United States Code, Sections
1465 and 2.

COUNT IX

On or about July 25, 1988, the defendants,
FERRIS JACOB ALEXANDER, SR.,
DOLORES ALEXANDER,
JEFFREY ALEXANDER, and
WANDA MAGNUSON,

knowingly transported in interstate commerce to the District of Minnesota for the purpose of sale and distribution, obscene, lewd, lascivious, and filthy films, figures, images, casts, electrical transcriptions and other articles capable of producing sound and other matters of indecent and immoral character, that is, 20 copies of:

"Bi and Beyond," a video tape movie;
all in violation of Title 18, United States Code, Sections
1465 and 2.

COUNT X

On or about November 26, 1985, the defendants,
FERRIS JACOB ALEXANDER, SR.,
DOLORES ALEXANDER,
JEFFREY ALEXANDER, and
WANDA MAGNUSON,

knowingly transported in interstate commerce to the District of Minnesota for the purpose of sale and distribution, obscene, lewd, lascivious, and filthy films, figures, images, casts, electrical transcriptions and other articles

capable of producing sound and other matters of indecent and immoral character, that is, 25 copies of:

"Big Bad Bertha," a video tape movie;
all in violation of Title 18, United States Code, Sections
1465 and 2.

COUNT XI

On or about January 16, 1989, the defendants,
FERRIS JACOB ALEXANDER, SR.,
DOLORES ALEXANDER,
JEFFREY ALEXANDER, and
WANDA MAGNUSON,

knowingly transported in interstate commerce to the District of Minnesota for the purpose of sale and distribution, obscene, lewd, lascivious, and filthy films, figures, images, casts, electrical transcriptions and other articles capable of producing sound and other matters of indecent and immoral character, that is, 20 copies of:

"Knights in White Satin," a video tape movie;
all in violation of Title 18, United States Code, Sections
1465 and 2.

COUNT XII

On or about November 10, 1987, the defendants,
FERRIS JACOB ALEXANDER, SR.,
DOLORES ALEXANDER,
JEFFREY ALEXANDER, and
WANDA MAGNUSON,

knowingly transported in interstate commerce to the District of Minnesota for the purpose of sale and distribution,

obscene, lewd, lascivious, and filthy films, figures, images, casts, electrical transcriptions and other articles capable of producing sound and other matters of indecent and immoral character, that is, 25 copies of:

"Knights in White Satin," a video tape movie;
all in violation of Title 18, United States Code, Sections 1465 and 2.

COUNT XIII

On or about April 4, 1988, the defendants,
FERRIS JACOB ALEXANDER, SR.,
DOLORES ALEXANDER,
JEFFREY ALEXANDER, and
WANDA MAGNUSON,

knowingly transported in interstate commerce to the District of Minnesota for the purpose of sale and distribution, obscene, lewd, lascivious, and filthy films, figures, images, casts, electrical transcriptions and other articles capable of producing sound and other matters of indecent and immoral character, that is, one copy of:

"Knights in White Satin," a video tape movie;
all in violation of Title 18, United States Code, Sections 1465 and 2.

COUNT XIV

On or about February 28, 1989, the defendants,
FERRIS JACOB ALEXANDER, SR.,
DOLORES ALEXANDER,
JEFFREY ALEXANDER, and
WANDA MAGNUSON,

knowingly transported in interstate commerce to the District of Minnesota for the purpose of sale and distribution,

obscene, lewd, lascivious, and filthy films, figures, images, casts, electrical transcriptions and other articles capable of producing sound and other matters of indecent and immoral character, that is, 15 copies of:

"Knights in White Satin," a video tape movie;
all in violation of Title 18, United States Code, Sections 1465 and 2.

COUNT XV

On or about June 1, 1987, the defendants,
FERRIS JACOB ALEXANDER, SR.,
DOLORES ALEXANDER,
JEFFREY ALEXANDER, and
WANDA MAGNUSON,

knowingly transported in interstate commerce to the District of Minnesota for the purpose of sale and distribution, obscene, lewd, lascivious, and filthy films, figures, images, casts, electrical transcriptions and other articles capable of producing sound and other matters of indecent and immoral character, that is, 100 copies of:

The Fat Book, a magazine;

all in violation of Title 18, United States Code, Sections 1465 and 2.

COUNT XVI

On or about November 16, 1987, the defendants,

FERRIS JACOB ALEXANDER, SR.,
DOLORES ALEXANDER,
JEFFREY ALEXANDER, and
WANDA MAGNUSON,

knowingly transported in interstate commerce to the District of Minnesota for the purpose of sale and distribution, obscene, lewd, lascivious, and filthy films, figures, images, casts, electrical transcriptions and other articles capable of producing sound and other matters of indecent and immoral character, that is, one copy of:

The Fat Book, a magazine;

all in violation of Title 18, United States Code, Sections 1465 and 2.

COUNT XVII

On or about November 24, 1987, the defendants,

FERRIS JACOB ALEXANDER, SR.,
DOLORES ALEXANDER,
JEFFREY ALEXANDER, and
WANDA MAGNUSON,

knowingly transported in interstate commerce to the District of Minnesota for the purpose of sale and distribution, obscene, lewd, lascivious, and filthy films, figures, images, casts, electrical transcriptions and other articles

capable of producing sound and other matters of indecent and immoral character, that is, 100 copies of:

The Fat Book, a magazine;

all in violation of Title 18, United States Code, Sections 1465 and 2.

COUNT XVIII

On or about December 9, 1987, the defendants,

FERRIS JACOB ALEXANDER, SR.,
DOLORES ALEXANDER,
JEFFREY ALEXANDER, and
WANDA MAGNUSON,

knowingly transported in interstate commerce to the District of Minnesota for the purpose of sale and distribution, obscene, lewd, lascivious, and filthy films, figures, images, casts, electrical transcriptions and other articles capable of producing sound and other matters of indecent and immoral character, that is, 100 copies of:

The Fat Book, a magazine;

all in violation of Title 18, United States Code, Sections 1465 and 2.

COUNT XIX

On or about January 4, 1988, the defendants,

FERRIS JACOB ALEXANDER, SR.,
DOLORES ALEXANDER,
JEFFREY ALEXANDER, and
WANDA MAGNUSON,

knowingly transported in interstate commerce to the District of Minnesota for the purpose of sale and distribution,

obscene, lewd, lascivious, and filthy films, figures, images, casts, electrical transcriptions and other articles capable of producing sound and other matters of indecent and immoral character, that is, one copy of:

The Fat Book, a magazine;

all in violation of Title 18, United States Code, Sections 1465 and 2.

COUNT XX

On or about September 9, 1987, the defendants,

FERRIS JACOB ALEXANDER, SR.,
DOLORES ALEXANDER,
JEFFREY ALEXANDER, and
WANDA MAGNUSON,

knowingly transported in interstate commerce to the District of Minnesota for the purpose of sale and distribution, obscene, lewd, lascivious, and filthy films, figures, images, casts, electrical transcriptions and other articles capable of producing sound and other matters of indecent and immoral character, that is, one copy of;

Leather Sleaze, a magazine;

all in violation of Title 18, United States Code, Sections 1465 and 2.

COUNT XXI

On or about November 1, 1984, the defendants,

FERRIS JACOB ALEXANDER, SR.,
DOLORES ALEXANDER,
JEFFREY ALEXANDER, and
WANDA MAGNUSON,

knowingly transported in interstate commerce to the District of Minnesota for the purpose of sale and distribution, obscene, lewd, lascivious, and filthy films, figures, images, casts, electrical transcriptions and other articles capable of producing sound and other matters of indecent and immoral character, that is, 100 copies of:

Leather Sleaze, a magazine;

all in violation of Title 18, United States Code, Sections 1465 and 2.

COUNT XXII

On or about November 8, 1984, the defendants,

FERRIS JACOB ALEXANDER, SR.,
DOLORES ALEXANDER,
JEFFREY ALEXANDER, and
WANDA MAGNUSON,

knowingly transported in interstate commerce to the District of Minnesota for the purpose of sale and distribution, obscene, lewd, lascivious, and filthy films, figures, images, casts, electrical transcriptions and other articles

capable of producing sound and other matters of indecent and immoral character, that is, one copy of:

Leather Sleaze, a magazine;

all in violation of Title 18, United States Code, Sections 1465 and 2.

COUNT XXIII

On or about February 25, 1985, the defendants,

FERRIS JACOB ALEXANDER, SR.,
DOLORES ALEXANDER,
JEFFREY ALEXANDER, and
WANDA MAGNUSON,

knowingly transported in interstate commerce to the District of Minnesota for the purpose of sale and distribution, obscene, lewd, lascivious, and filthy films, figures, images, casts, electrical transcriptions and other articles capable of producing sound and other matters of indecent and immoral character, that is, one copy of:

Let's Have a Fuck Party, a magazine;

all in violation of Title 18, United States Code, Sections 1465 and 2.

COUNT XXIV

On or about March 9, 1988, the defendants,

FERRIS JACOB ALEXANDER, SR.,
DOLORES ALEXANDER,
JEFFREY ALEXANDER, and
WANDA MAGNUSON,

knowingly transported in interstate commerce to the District of Minnesota for the purpose of sale and distribution,

obscene, lewd, lascivious, and filthy films, figures, images, casts, electrical transcriptions and other articles capable of producing sound and other matters of indecent and immoral character, that is, one copy each of:

Let's Have a Fuck Party, a magazine; and
Women Who Need Powerful Men, a magazine;

all in violation of Title 18, United States Code, Sections 1465 and 2.

COUNT XXV

On or about March 22, 1988, the defendants,

FERRIS JACOB ALEXANDER, SR.,
DOLORES ALEXANDER,
JEFFREY ALEXANDER, and
WANDA MAGNUSON,

knowingly transported in interstate commerce to the District of Minnesota for the purpose of sale and distribution, obscene, lewd, lascivious, and filthy films, figures, images, casts, electrical transcriptions and other articles capable of producing sound and other matters of indecent and immoral character, that is, 100 copies of each:

Let's Have a Fuck Party, a magazine and
Women Who Need Powerful Men, a magazine;

all in violation of Title 18, United States Code, Sections 1465 and 2.

COUNT XXVI

On or about August 17, 1988, the defendants,

FERRIS JACOB ALEXANDER, SR.,
DOLORES ALEXANDER,
JEFFREY ALEXANDER, and
WANDA MAGNUSON,

knowingly transported in interstate commerce to the District of Minnesota for the purpose of sale and distribution, obscene, lewd, lascivious, and filthy films, figures, images, casts, electrical transcriptions and other articles capable of producing sound and other matters of indecent and immoral character, that is, one copy of:

Sweet Ass, a magazine;

all in violation of Title 18, United States Code, Sections 1465 and 2.

COUNT XXVII

On or about August 25, 1988, the defendants,

FERRIS JACOB ALEXANDER, SR.,
DOLORES ALEXANDER,
JEFFREY ALEXANDER, and
WANDA MAGNUSON,

knowingly transported in interstate commerce to the District of Minnesota for the purpose of sale and distribution, obscene, lewd, lascivious, and filthy films, figures, images, casts, electrical transcriptions and other articles

capable of producing sound and other matters of indecent and immoral character, that is, 200 copies of:

Sweet Ass, a magazine;

all in violation of Title 18, United States Code, Sections 1465 and 2.

COUNT XXVIII

On or about October 8, 1984, the defendants,

FERRIS JACOB ALEXANDER, SR.,
DOLORES ALEXANDER,
JEFFREY ALEXANDER, and
WANDA MAGNUSON,

knowingly transported in interstate commerce to the District of Minnesota for the purpose of sale and distribution, obscene, lewd, lascivious, and filthy films, figures, images, casts, electrical transcriptions and other articles capable of producing sound and other matters of indecent and immoral character, that is, 50 copies of:

Taboo II, a magazine

all in violation of Title 18, United States Code, Sections 1465 and 2.

COUNT XXIX

On or about June 27, 1985, the defendants,

FERRIS JACOB ALEXANDER, SR.,
DOLORES ALEXANDER,
JEFFREY ALEXANDER, and
WANDA MAGNUSON,

knowingly transported in interstate commerce to the District of Minnesota for the purpose of sale and distribution,

obscene, lewd, lascivious, and filthy films, figures, images, casts, electrical transcriptions and other articles capable of producing sound and other matters of indecent and immoral character, that is, 40 copies of:

"The Lusty Adventurer," a video tap [sic] movie;

all in violation of Title 18, United States Code, Sections 1465 and 2.

COUNT XXX

On or about November 13, 1984, the defendants,

FERRIS JACOB ALEXANDER, SR.,
DOLORES ALEXANDER,
JEFFREY ALEXANDER, and
WANDA MAGNUSON,

knowingly transported in interstate commerce to the District of Minnesota for the purpose of sale and distribution, obscene, lewd, lascivious, and filthy films, figures, images, casts, electrical transcriptions and other articles capable of producing sound and other matters of indecent and immoral character, that is, one copy of:

"She Male Encounters, #3", a video tape movie;

all in violation of Title 18, United States Code, Sections 1465 and 2.

COUNT XXXI

On or about January 21, 1986, the defendants,

FERRIS JACOB ALEXANDER, SR.,
DOLORES ALEXANDER,
JEFFREY ALEXANDER, and
WANDA MAGNUSON,

knowingly transported in interstate commerce to the District of Minnesota for the purpose of sale and distribution, obscene, lewd, lascivious, and filthy films, figures, images, casts, electrical transcriptions and other articles capable of producing sound and other matters of indecent and immoral character, that is, 25 copies of:

"She Male Encounters," #3, a video tape movie;

all in violation of Title 18, United States Code, Sections 1465 and 2.

COUNT XXXII

On or about December 14, 1988, in the State and District of Minnesota, the defendants,

FERRIS JACOB ALEXANDER, SR.,
DOLORES ALEXANDER,
JEFFREY ALEXANDER, and
WANDA MAGNUSON,

they then being engaged in the business of selling and transferring obscene matter, did knowingly possess with intent to distribute an obscene magazine which had been shipped and transported in interstate commerce, to wit: *The Fat Book*, at Nicola Bookstore, 2938 Lyndale, Minneapolis, Minnesota; all in violation of Title 18, United States Code, Sections 1466 and 2.

COUNT XXXIII

On or about December 14, 1988, in the State and District of Minnesota, the defendants,

FERRIS JACOB ALEXANDER, SR.,
DOLORES ALEXANDER,
JEFFREY ALEXANDER, and
WANDA MAGNUSON,

they then being engaged in the business of selling and transferring obscene matter, did knowingly possess with intent to distribute obscene magazines which had been shipped and transported in interstate commerce, to wit: *The Fat Book* and *Leather Sleaze*, at East Hennepin Bookstore, 401 East Hennepin Avenue, Minneapolis, Minnesota; all in violation of Title 18, United States Code, Sections 1466 and 2.

COUNT XXXIV

On or about December 14, 1988, in the State and District of Minnesota, the defendants,

FERRIS JACOB ALEXANDER, SR.,
DOLORES ALEXANDER,
JEFFREY ALEXANDER, and
WANDA MAGNUSON,

they then being engaged in the business of selling and transferring obscene matter, did knowingly possess with intent to distribute an obscene magazine which had been shipped and transported in interstate commerce, to wit: *Leather Sleaze*, at The Flick Theater, 623 University Avenue West, St. Paul, Minnesota; all in violation of Title 18, United States Code, Sections 1466 and 2.

COUNT XXXV

On or about December 14, 1988, in the State and District of Minnesota, the defendants,

FERRIS JACOB ALEXANDER, SR.,
DOLORES ALEXANDER,
JEFFREY ALEXANDER, and
WANDA MAGNUSON,

they then being engaged in the business of selling and transferring obscene matter, did knowingly possess with intent to distribute obscene magazines which had been shipped and transported in interstate commerce, to wit: *Leather Sleaze* and *The Fat Book*, at the Lake Street Bookstore, 343 East Lake Street, Minneapolis, Minnesota; all in violation of Title 18, United States Code, Sections 1466 and 2.

COUNT XXXVI

On or about December 14, 1988, in the State and District of Minnesota, the defendants,

FERRIS JACOB ALEXANDER, SR.,
DOLORES ALEXANDER,
JEFFREY ALEXANDER, and
WANDA MAGNUSON,

they then being engaged in the business of selling and transferring obscene matter, did knowingly possess with intent to distribute an obscene film, videotape and audio recording, which had been shipped and transported in interstate commerce, to wit: "She Male Encounters, #3", at Adult Entertainment Center, 420 Hennepin Avenue, Minneapolis, Minnesota; all in violation of Title 18, United States Code, Sections 1466 and 2.

COUNT XXXVII

On or about February 28, 1989, in the State and District of Minnesota, the defendants,

FERRIS JACOB ALEXANDER, SR.,
DOLORES ALEXANDER,
JEFFREY ALEXANDER, and
WANDA MAGNUSON,

they then being engaged in the business of selling and transferring obscene matter, did knowingly possess with intent to distribute an obscene magazine which had been shipped and transported in interstate commerce, to wit: *Leather Sleaze*, at Adult Entertainment Center, 420 Hennepin Avenue, Minneapolis, Minnesota; all in violation of Title 18, United States Code, Sections 1466 and 2.

COUNT XXXVIII

On or about March 10, 1989, in the State and District of Minnesota, the defendants,

FERRIS JACOB ALEXANDER, SR.,
DOLORES ALEXANDER,
JEFFREY ALEXANDER, and
WANDA MAGNUSON,

they then being engaged in the business of selling and transferring obscene matter, did knowingly possess with intent to distribute obscene films, videotapes and audio recordings, which had been shipped and transported in interstate commerce, to wit: "Collection, Volume #3" and "The Lusty Adventurer", at Video Hits, 5309 36th Avenue North, Crystal, Minnesota; all in violation of Title 18, United States Code, Sections 1466 and 2.

COUNT XXXIX

On or about March 10, 1989, in the State and District of Minnesota, the defendants,

FERRIS JACOB ALEXANDER, SR.,
DOLORES ALEXANDER,
JEFFREY ALEXANDER, and
WANDA MAGNUSON,

they then being engaged in the business of selling and transferring obscene matter, did knowingly possess with intent to distribute obscene magazines which had been shipped and transported in interstate commerce, to wit: *Let's Have a Fuck Party* and *Sweet Ass*, at the Chicago-Lake Bookstore, 741 East Lake Street, Minneapolis, Minnesota; all in violation of Title 18, United States Code, Sections 1466 and 2.

COUNT XL

On or about March 24, 1989, in the State and District of Minnesota, the defendants,

FERRIS JACOB ALEXANDER, SR.,
DOLORES ALEXANDER,
JEFFREY ALEXANDER, and
WANDA MAGNUSON,

they then being engaged in the business of selling and transferring obscene matter, did knowingly possess with intent to distribute an obscene magazine which had been shipped and transported in interstate commerce, to wit: *Sweet Ass*, at Wabasha Books, 15 East Superior Street, Duluth, Minnesota; all in violation of Title 18, United States Code, Sections 1466 and 2.

COUNT XLI

On or about May 21, 1985, in the State and District of Minnesota, the defendant,

FERRIS JACOB ALEXANDER, SR.,

for the purpose of impeding, impairing, obstructing and defeating the lawful functions of the Internal Revenue Service in the ascertainment, computation, assessment and collection of the revenue and for concealing his true identity, and with intent to deceive, did willfully and knowingly falsely represent that account number 348-12-0381 was the social security account number assigned by the Secretary of Health and Human Service of the United States to him, when in fact, as the defendant well knew, such number was not the social security account number assigned by the Secretary to the defendant; all in violation of Title 42, United States Code, Section 408(g) (2).

Jury Instructions Regarding Forfeiture
Transcript Vol. XXXIX, pp. 144-154
May 24, 1990

* * *

[p. 144] THE COURT: Thank you, counsel. Ladies and gentlemen, I think the first thing that I want to tell you is, there's no more surprises, and depending on whatever you do, there won't be any more work for you to do, so this is the last job and the last series of questions. It's a lengthy series of questions, and at this time I will instruct you.

I am not supplying you with a copy of the instructions for you to review as we go over them. You will discover these instructions are a good deal shorter than the last, [p. 145] although I will supply you with a copy, the same sort of scrolled copy that you worked with as you went through the last part of your work. In a few cases I will repeat things that you had heard before or that you saw before. I will not go over with you the responsibilities of the lawyers, the fashions in which you might review or analyze evidence, comments about expertise and comments about credibility and your ability to draw conclusions. If ever I have seen an educated jury, and one that is well familiar with those principles, you are now before me, and there's no reason for me to go over them again.

But let me tell you, as I did before, that now that you have heard the evidence and you've heard all sides argue, it is again my duty to give you the instructions of the law which are applicable to this phase of the case. And, again, it is your duty as jurors to follow the instructions which I

give to you, and apply the rules of law to the facts which you find them as you work toward rendering your verdict.

Again, counsel have referred at various points to the instructions which I will give you, and again I tell you that anything that I say in these instructions will overrule any statements that they have made in any regard to the contrary. And I know that you understand they're permitted to make comments, but when I give you the statements of the law, those are the law that I know you will apply.

[p. 146] Again I tell you, you ought not to select only a single instruction. Again, you must apply all of these instructions, and as I told you before, we are not asking from you your view of the wisdom of the law that you are to apply. That is the law that has been given, and I know it is the law that you will apply to the facts as you have found them.

You are instructed that you should determine what the facts are in this case, and then apply those facts to this law as I give to you. It is not your function to determine whether a given asset should or should not be forfeited, regardless of what each counsel may have said. Your job in this case is to determine whether the particular defendant before you, Ferris J. Alexander, had an interest, had a property right or a contract right in a specific piece of property or specific property, and that property was used as a part of the racketeering enterprise on which you have just entered your verdict of guilty, or whether or not

such property afforded the defendant a source of influence over the establishment, the conduct, or the operation of that enterprise.

Furthermore, I tell you that you should not let punishment be a factor in any regard in your deliberations. Punishment, and punishment under law for any offense charged in the indictment, is a matter exclusively within the [p. 147] province of the Court. Ladies and gentlemen, that is my concern, and it is not your concern, and must never be considered by you in any way in arriving at your impartial verdict in the case.

You have determined by your verdict that the defendant, Ferris J. Alexander, did violate Title 18 United States Code Section 1962(d) as charged in Count IV of the indictment, that was one of the RICO counts, Section 1962(a), as charged in Count V of the indictment, and Section 1962(c) as charged in Count VI of the indictment. The other two of the three, so all three of the RICO counts. Title 18, and now I'm going back into statute with you, Title 18 United States Code Section 1963 provides: That whoever violates any provision of Section 1962, that is the RICO statute, shall forfeit to the United States up to three different items - do you need a glass of water? Okay. Shall forfeit: One, any interest that person has in the enterprise; or second, any property right of any kind which affords him or her a source of influence over the enterprise; or third, any contractual right of any kind which affords him or her a source of influence over the enterprise which he or she has established, operated, controlled, conducted, or participated in in violation of 1982, Section 1982 -

MR. SMITH: 62.

THE COURT: 62, thank you. You must now deliberate [p. 148] and decide whether the defendant has any such interest in or property or contractual right of any kind which afforded a source of influence over any enterprise which that person has established, operated, controlled, conducted or participated in the conduct of in violation of 18 United States Code Section 1962.

Property subject to forfeiture under the RICO Act includes real property, together with any improvements – real property, by the way, if you don't know, is land, basically, or parts of the earth, if you will, buildings on them – together with any improvements, appurtenances, fixtures, as well as tangible and intangible, personal property such as automobiles and bank accounts, as well as rights, privileges, and interests in businesses, partnerships, or corporations.

Your previous determination that Ferris Alexander is guilty of the offenses charged in Counts IV, V, and VI is binding on this part of the proceedings. I instruct you that you are not to discuss and determine again whether or not he is guilty or not guilty of those charges. That question is a settled question.

I further instruct you that what happens to any property or any interest in any property again, as I told you, is exclusively for me to decide. You should not consider what might happen to such property.

[p. 149] In addition, I instruct you, that all of the instructions which I previously gave you to apply during your deliberations, including those dealing with evidence

and dealing with credibility, as I told you, your obligations to deliberate with each other, and the necessity for a unanimous verdict, all standing instructions remain in operation. Okay?

The specific instructions which I gave to you, however, which concerned Counts IV, V, and VI, and the definition of the terms enterprise and pattern of racketeering activity will continue to apply. In this regard the lawyers have agreed I will give you back, if you will, the previous set of instructions. I know that you have probably worn them to a frazzle, but you at least know how to work with them, and you know where things are in them if you need to refer to them.

The government's burden of proof at this stage of the proceeding is to prove each element beyond a reasonable doubt. It is the same standard of proof that you previously applied. Again I would tell you and remind you that does not require the government to prove each element beyond all possible doubt, the test is reasonable doubt.

The burden always lies upon the government, the prosecution, if you will, to prove each element beyond a reasonable doubt, and again the burden does not shift to the [p. 150] defendant. The law never imposes on a defendant in a criminal case the burden or the duty of calling any witnesses or producing any evidence, and so if the jury after careful and impartial consideration of all of the evidence in the case has that reasonable doubt as to any question in the special verdict form, which I will give to you in a few minutes, you would of course answer no to that question.

And there has been prepared a special verdict form. I will not read this to you, but I want to tell you about it and describe it to you. The verdict, as you will see, is divided by item number. We have not put the caption at the top. It is obviously the same case, and concerns the same case. It is numbered, and divided by item number, each number relating to a particular item of property or an asset, and you are going to be asked two sets of questions about each of those items, and you will place an "X" on the proper line.

Ladies and gentlemen, it begins, and it's not stapled together, so you can kind of move through it a little bit, on the other hand, if you can kind of keep it together at the end, and I notice you're very good at that, because you lined up all the evidence when you were done and all in numerical order, and thank you. Special verdict form as to Ferris Alexander is its title, and it begins with item [p. 151] number one, as you've cleverly guessed. And then there's a description of the item. It says here all interests, holdings, assets, and claims of a business known as A.B. Distributors, also known as, or including but not limited to, inventory, accounts receivable, business name or names of vehicles, equipment, office furniture, computers, safes, television sets, video cassettes, and bank accounts, so in reference to A.B. Distributors, there then follows two questions. One: Does the defendant, Ferris Alexander, have an interest in this business? Yes/no. Number two: Was this business used by defendant, Ferris Alexander, to establish, operate, control, conduct, or participate in the conduct of an enterprise in violation of the racketeering laws? Yes/no.

Let me just skip ahead, I just turned to number 43, because I went from a business to a piece of real property, now, I believe. Number 43 is, and I just - I hit that one just because I pulled it, but there's a number of pieces of real property involved also. Real property, this is item 43, and the description is, real property, including any buildings, improvements, appurtenances, and fixtures thereof, located at 319 to 323 South Broadway, Rochester, Olmstead County, Minnesota, commonly known as Broadway Book 2, first question: Does the defendant, Ferris J. Alexander, have an interest in such property? Yes/no. Two: Was this [p. 152] property used in or did it afford a source of influence over the enterprise that defendant, Ferris J. Alexander, established, operated, controlled, conducted, or participated in the conduct of in violation of the racketeering laws? Answer: Yes/no. Okay.

That's a description for our purposes of this verdict form. The indictment in the case, and you will again be supplied with the portions of the indictment which you have had up until now, alleges that defendant, Ferris Alexander, has an interest in a business known as A.B. Distributors, also known as the Newspaper Club, Kenneth LaLonde Enterprises, LeRoy Wendling, American Book Wholesalers, United States Video, which is spelled for some reason Sates, U.S. Video, United States Video Distributors, American Book Wholesalers, A.B. Video, A and B Distributors, American Theater Supply Company, A.B. Distributing, Magazine and Book Agency, J. Thomas Company, John Thomas Company, Baker Investment, Bell Investment, Video Hits, and Express Entertainment.

You, the jury, have the responsibility to determine whether Ferris Alexander has an interest in each separate entity on the verdict form, and whether again that entity was used in the establishment, operation, control, or conduct of the enterprise for which the defendant has been convicted.

[p. 153] The indictment alleges that the defendant, Ferris Alexander, has an interest in a corporation known as Haista Paska, Inc. Also known as Haista Paska. Hais-tpka, and you'll see the spelling, but I believe it's used in some places or suggested that it's used in that fashion, Video Hits, Inc., and Video Hits, which is alleged to be a subject to forfeiture by the government.

You, the jury, have the responsibility, again, to determine whether Ferris Alexander has an interest in this corporation and whether that corporation was used in the establishment, operation, control, or conduct of the enterprise for which the defendant has been convicted.

There is similar inquiry about each of the pieces of real estate. You'll recall as I went over 43 I picked up that one. I could have also paged and hit one of the corporations. I didn't hit those, but each of those kinds of property is listed and dealt with.

Ladies and gentlemen, again I remind you that your verdict will have to be unanimous as to every answer that you will put on this form. You will take the form with you to the jury room. Again, when you have reached your unanimous verdict as to each of the subject questions, you will direct your foreperson to sign and date the form and return with that verdict form into this courtroom.

As you did at the end of the first phase, you will upon [p. 154] retiring to the jury room either select a new foreperson or continue with the same foreperson whom you previously have selected. That person will preside over your deliberations and will remain your spokesperson in and before this Court.

* * *

**Transcript of Sentencing Hearing,
August 6, 1990**

* * *

[p. 67] THE COURT: I have received a number of letters, Mr. [p. 68] Alexander, letters from members of your family, some letters from the community. Your lawyers have been careful to keep me advised of all of their positions and their arguments. I have thought very hard about all of these matters and the evidence which I learned at trial.

You ask why others are not charged. And I tell you, sir, that is not a question that I am concerned with, nor is it a question with which you need to be concerned. The Government has the authority and responsibility of enforcing the laws and there are not enough prosecutors, as many as they seem to be able to create, to root out every violation of the law. But, that is no defense when you stand before the Court guilty of a violation of the law. If they have prosecuted properly and tried their case fairly and you have violated the law, that is your problem. The other is a philosophical discussion which need not be engaged in and I decline to discuss it further.

I tell you, sir, that I am absolutely convinced that you had a fair and a full trial. You were well represented by good and competent lawyers who worked zealously on your behalf. You know and they know that you faced a competent and quality jury that worked hard and deliberated hard and drew distinctions in their work showing that they understood the law full well and applied it in a fair fashion as best they were able.

[p. 69] I tell you, sir, as I sit here, there is not a more staunch defender of the First Amendment than the judge who sits on your case. And I do not put that in for any self congratulations, but I tell you, I am aware as you are that pornography, obscenity, is not within the ambit of the First Amendment and the Supreme Court has said so from the beginning. And so, you are not being prosecuted and have not been found guilty of dealing in protected matters.

You are well aware, and the record and the published opinions will show this Court's concern. The record will also show that your businesses have been permitted to continue out of respect and concern for that same first amendment. And I will tell you that that has not been without careful and intense scrutiny by the Government and by the public.

You stand before me convicted of RICO offenses, convicted of obscenity offenses, convicted of tax evasion offenses. I note that the Government proved, at much difficulty, the loss of some \$2.7 million, or the under-reporting of some \$2.7 million in revenues. That was only money that moved through and left some kind of tracks. You know as you sit there that every quarter that passed through every machine in every peep show in every store didn't pass a counter. And the money was brought in in buckets and placed on your desk. And apparently, according to the testimony, once a month you [p. 70] reported the total revenue you realized. I do not comment further on whether or not there may in fact be other dollars that were found to have been short.

I tell you that I have pending before me motions which seek arrest of judgment or a new trial; and those motions are denied. At the same time as I consider some of those things, I also consider, sir, your family. If there is one thing in the world to which you seem to be dedicated, while the Government urges it is money, it is also your family as you see it. I am aware that you have taken care of children, kept them in your home when difficult times had befallen them, and that is always commendable. But, the reality is that all of our activities must be conducted within the law. Your children and your family are arrayed before you at this time and that speaks well for their care for you.

But, now I want to talk a bit more about your care for the community. You have chosen to engage in business and in activities, and you have done so in a fashion which has much benefited you and you are aware has much cost the community.

When Ferris Alexander bought a building, he bought it at a price, which he is entitled to do, but scared the community. And the community paid dear for the pleasure of asking you to leave. And you profited.

Now, we operate in a mercantile society and you are permitted to do so, but you knew what you were doing, and [p. 71] that brought concerns to the community. And that is not a factor in your sentence, but it is a real factor in terms of your work and the things which you did.

I tell you that your concern for the Court is a disgrace. The testimony which you gave in this Court in many cases I did not find to be perjurious, that is a decision for grand juries and other prosecutions, but a

willingness, if you don't like one version of the facts, I will give you a different one. If you don't like to file things under your name, they will be filed under someone else's. Sworn documents were filed in this Court at your behest by people who didn't even know they were parties to the case. And they were filed in a fashion which advanced and benefited your case, your position, your business, as you saw fit to transact it.

You did your business and your banking through systems that were known to you and secreted in every other fashion from the world. Money would come in and money would go out. And some more would go in, but it would never be accounted for in any fashion. And you tell me that it is an accounting function.

Sir, filing your income under nominees, under a Kenneth LaLonde, or under a Leroy Wendling is not an accounting decision, it is a managerial decision designed to hide what you had and what you earned. And when you did it, you were [p. 72] not following that kind of advice that a person would line themselves. Those people made what, eight, ten, \$14,000 a year? But instead, they reported - what? Two million, three million dollars a year, four million? That wasn't their money, it was yours. You don't need a CPA to tell you that and you don't need a judge to tell you that. But, I am telling it to you now, because it was proven in this courtroom.

All of your records were kept, according to your lawyers, but the Court is well aware that large numbers of the money orders were obtained not by tracing your records, but by subpoenaing ten or twenty numbers ahead and behind what you had in your records, and

they picked them up because your records didn't encompass those.

You have hidden yourself behind a friend who you claim to honor, Pete Saba, who is now gone, but has made, remarkably, an appearance by writing a letter on your behalf which was published in the Minneapolis paper since your conviction. As a person who used to practice in Chicago, it is always fascinating to me how those things go. You have created fictitious characters to operate on your behalf. Mr. Alexander, you have knowingly chosen to skate near the edge. You have done so knowingly and you have done so willfully. And when you do, the ice can crack.

I tell you, Ferris Jacob Alexander, that you have been [p. 73] charged in Count 1 with conspiracy to defraud the United States by impeding the Internal Revenue Service, that being in violation of 18 United States Code Section 371.

In Counts 2 and 3, with filing a false tax return, in violation of 26 United States Code section 7206.

In Count 4, with conspiracy to violate the RICO, Influenced Corrupt Organization - I am sorry, the Racketeering Influenced Corrupt Organization Act, that is RICO, in violation of 18 United States Code Section 1962D.

In Count 5, with investing racketeering proceeds in violation of 18 United States Code, 1962A.

In Count 6, with conducting a RICO enterprise through a - an enterprise through a pattern of racketeering activity violating 18 United States Code 1963D.

In Counts 7, 8, 9, 20, 21, 22, 23, 24, 25, 28, 30 and 31, with interstate transportation of obscene material for the purpose of sale in violation of 18 United States Code, Section 1465.

In Counts 33, 34, 35, 36, 37, and 39, with engaging in the business of selling obscene material, in violation of 18 United States Code, Section 1466.

And in Count 41, with using a false Social Security number, violating 42 United States Code, Section 408G(2). Based upon the jury's verdict of guilty as to those counts, it is considered and it is adjudged that you are guilty of [p. 74] those offenses.

Therefore, it is adjudged that as to Counts 1, 2, - or I'm sorry, 1, 4, 5, 6, 7, 8, 9, 24, 25, 33, 34, 35, 36, 37 and 39, the Defendant is committed to the custody of the Bureau of Prisons for imprisonment for a term of 72 months, each term to run concurrently with the other.

Further, it is adjudged that as to Counts 1, 4, 5, 6, 7, 8, 9, 24, 25, 33, 34, 35, 36, 37 and 39, the defendant will serve a term of supervised release, during which it is required that you comply with all state and federal and local laws, that you abide by the rules and the regulations of the probation office. And you will be not permitted to possess firearms or dangerous weapons. The sentences of supervised release will run concurrently, on with another.

Further, it is adjudged that as to Counts 1, 4, 5, 6, 7, 8, 9, 24, 25, 33 through 37 and 39, the Defendant will pay a fine in the committed sum of \$100,000.

Further, it is adjudged that as to those same counts, the Defendant will pay the costs of his incarceration and

supervised release. At this time that is in the amount of \$1,415.56 for the period of incarceration, and \$96.66 for the months of the term of your supervised release. And that is in accord with the presentence investigation.

Further, it is adjudged that as to those counts, the Defendant will pay a special assessment in the sum of \$750, [p. 75] which represents \$50 for each count. That supervised release term will run for a period of three years.

Further, it is adjudged that as to Counts 2, 3, 20, 21, 22, 23, 28, 30, 31, and 41, you are committed to the custody of the Attorney General for imprisonment for a term of three years which sentence will run concurrent to each other and similarly concurrent with those sentences which were previously imposed.

It is a further adjudged that as to Counts 20, 23, 31 and 41, you will pay a special assessment in the amount of \$200, which represents the sum of \$50 for each count. That makes a total, I believe, of 950 in special assessments.

It is further adjudged that you shall forfeit the property and proceeds set forth in this Court's order which will be issued later today, but I tell you that under the RICO law, those are the sums which have been seized by the United States and aggregate in excess of \$8,000,000 in cash and personal property, as well as each entity and parcel of real estate which was found subject to forfeiture by the jury in this case.

You will also, as I have indicated, pay your costs of prosecution and your costs of imprisonment. This order

implementing the RICO forfeiture provisions will be issued in full, and it will be incorporated into this sentencing memorandum as part of its statement of reasons.

[p. 76] I tell you, Mr. Alexander, that you have an absolute right, both respecting your conviction and your sentence, under the Rules of Federal - Federal Rules of Civil Procedure, Federal Rules of Criminal Procedure, 32A(2) to appeal both your conviction and this sentence. That appeal must be filed within ten days, and I am confident that your lawyer will take that step.

* * *

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION
CRIMINAL NO. 4-89-85

UNITED STATES OF AMERICA,)	
)	
Plaintiff,)	FINAL ORDER
)	OF FORFEITURE
v.)	
FERRIS J. ALEXANDER, SR.,)	(Filed
and WANDA MAGNUSON,)	Jan 30, 1991)
)	
Defendants.)	

The above-entitled matter is before this Court with respect to petitions filed pursuant to Title 18, United States Code § 1963 (1) to property forfeited to the United States by Court Order and Judgment of Forfeiture, paragraph 2, to wit:

Real property, including any buildings, improvements, appurtenances and fixtures thereof located at 311-315 East Lake Street, Minneapolis, Legally described as Lots 38 through 41 inclusive, State Addition to Minneapolis, Hennepin County, Minnesota, and commonly known as the AB Distributors Company.

Following a full hearing conducted on November 8, 1990 held pursuant to Title 18, United States Code § 1963 (1) (6) at which all petitions regarding the subject property were considered, and based on the Stipulation Re Claim of the Kuechles and Armstrong filed herein, and this Court further taking into consideration the record of

the criminal trial which resulted in its Order of Forfeiture, the Court makes the following findings of fact, conclusions of law, and order:

1. This Court has jurisdiction of the petitioners asserting legal interests in the real property and to adjudicate the validity of their claimed interests.

2. The United States provided direct Notice of the Order and Judgment of Forfeiture, its intent to dispose of the property, and the rights of third parties to petition the Court for a hearing on their claims to the following persons and entities:

- a. Dolores Alexander
- b. Jefferey Alexander
- c. Caroline Alexander
- d. Robin Alexander
- e. Susan Alexander
- f. Ferris J. Alexander, Jr.
- g. Gust Alexander
- h. State of Minnesota
- i. Hennepin County
- j. Harry B. Kuechle
- k. Virginia Kuechle

3. The United States published Notice of the Order and Judgment of Forfeiture, of its intent to dispose of the property, and the rights of third parties to petition the Court for a hearing on their claims in the following newspapers of general circulation:

- a. Minneapolis Star Tribune from August 19 to September 2, 1990.
- b. St. Paul Pioneer Press from August 20 to September 3, 1990.

- c. Finance and Commerce from August 17 to August 31, 1990.
 - d. Rochester Post Bulletin from August 21 to September 4, 1990.
 - e. Winona Daily News from August 21 to September 4, 1990.
4. The following persons or entities filed petitions with this Court and requested a hearing as to the validity of their claims of legal interest:
- a. Dolores A. Alexander on September 6, 1990
 - b. Hennepin County on September 27, 1990.
 - c. Harry B. Kuechle, Virginia M. Kuechle, William E. Kuechle, Betty R. Kuechle, and Ione K. Armstrong on August 31, 1990.
5. With respect to the petition of Dolores A. Alexander, this Court specifically finds that the claimant has not established that she has any present legal right, title or interest in the subject property.
6. This court further finds that Dolores A. Alexander's inchoate interests in the property of her husband, Ferris J. Alexander, Sr., have been terminated by the forfeiture of his interest in this property to the United States.
7. With respect to the petition of Hennepin County, this Court specifically finds that the following real estate taxes were due and owing as of August 6, 1990 and constitute a prior encumbrance on the real estate superior to the interest of the United States:

1989:	\$7,421.92
1990:	6,646.67
	<u>14,068.59</u>

8. The interest of Ferris J. Alexander in the above-described property which is subject to forfeiture in this proceeding is the vendee's interest under a certain Contract for Deed dated March 9, 1981, and duly recorded in the office of the Hennepin County Recorder on March 20, 1981, as Document No. 4632159, as modified by a certain Extension Agreement made in March of 1989.

9. With respect to the petition of Harry B. Kuechle, Virginia M. Kuechle, William E. Kuechle, Betty R. Kuechle, and Ione Armstrong, contract for deed vendors, this court specifically finds that the petitioners have a legal interest in said property which is prior to the interest of the United States, and that the amount due and owing to these petitioners on the contract for deed is an unpaid principal balance of \$42,083.21, plus unpaid interest on said sum at the rate of 11% per annum from June 1, 1990, plus any other sums payable pursuant to the Extension Agreement.

10. That it appears from the record that no other claims, contested or otherwise, have been filed with respect to the subject property described in paragraph 2 of this Court's August 6, 1990 Order and Judgment of Forfeiture.

IT IS HEREBY ORDERED, ADJUDGED and DECREED:

1. That the vendee's interest under the above-described Contract for Deed (Document No. 4632159 in the office of the Hennepin County Recorder) in the following property is condemned and forfeited to the United States:

Lots 38 through 41 inclusive, State Addition to Minneapolis, Hennepin County, Minnesota.

2. That the United States has clear title to the above-described vendee's interest in real property and may warrant good title to any subsequent purchaser or transferee by U.S. Marshal's Deed.

3. That the United States Attorney General or his designated agent shall direct the disposition of the forfeited property by sale or other commercially feasible means and the proceeds of any sale or other disposition of the property shall be used to pay all proper expenses for the forfeiture and the sale, including expenses of seizure, maintenance and custody of the property pending its disposition, advertising, and court costs.

4. That the United States Attorney General shall further pay out of the sale proceeds Hennepin County property taxes in the amount of \$14,068.59 and shall obtain from the taxing authority an appropriate release, cancellation and satisfaction, which the County taxing authority is hereby ordered to deliver upon payment, evidencing payment of the same.

5. That the interests of the contract for deed vendors shall also be satisfied out of the sale proceeds, and upon receipt of all sums due them, said petitioners shall execute an appropriate deed conveying their interest to the United States or the grantee as directed by the United States Marshal.

6. That the United States Attorney General or his designated agent shall deposit any remaining proceeds from the sale of the forfeited property into the Treasury pursuant to Title 18, United States Code § 1963 (f).

The Clerk is hereby directed to send copies of this Order to all counsel of record and the United States Marshal.

LET JUDGMENT BE ENTERED.

Dated: January 28, 1991

/s/ James M. Rosenbaum
JAMES M. ROSENBAUM,
Judge
United States District Court

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION
CRIMINAL NO. 4-89-85

UNITED STATES OF AMERICA,)	
Plaintiff,)	
v.)	FINAL ORDER
FERRIS J. ALEXANDER, SR.,)	OF FORFEITURE
and WANDA MAGNUSON,)	
Defendants.)	

The above-entitled matter is before this Court with respect to petitions filed pursuant to Title 18, United States Code § 1963 (1) to property forfeited to the United States by Court Order and Judgment of Forfeiture, paragraph 11 through 28, to wit:

1. All interests, holdings, assets and claims in non-corporate businesses known as:

AB Distributors
The Newspaper Club
Kenneth LaLonde Enterprises
LeRoy Wendling
The Superior Street Company
Express Entertainment
United States Video
U.S. Video
United States Video Distributors
Baker Investments
American Book Wholesalers
A.B. Video
A & B Distributors
Bell Investments
American Theater Supply Company

Video Hits
AB Distributing
Magazine and Book Agency

including but not limited to inventory, accounts receivable, business name or names, vehicles, equipment, office furniture, computers, safes, television sets, video cassette recorders, U.S. currency, and all funds credited to the following bank accounts as of May 25, 1990:

- a. A bank account held in the name of the Newspaper Club with the Union Bank & Trust Company, Account No. 101084400.
- b. A bank account in the name of A.B. Distributors with the First Bank - St. Anthony Falls, Account No. 206-3023-374.
- c. A bank account in the name of Broadway Bookstore with the Marquette Bank and Trust, Rochester, Account No. 2389-625.
- d. A bank account in the name of U.S. Video with the Marquette Bank and Trust, Rochester, Account No. 2488-925.
- e. A bank account in the name of Wabasha Bookstore with the Norwest Bank, Duluth, Account No. 0116-863.
- f. A bank account in the name of Ferris J. Alexander with the First Bank Duluth, Account No. 1095-930.
- g. A bank account in the name of American Theater Supply and the Gardner Hotel with the Norwest Bank, Duluth, Account No. 116-848.

- h. A bank account in the name of Ferris Alexander with the Merchants National Bank of Winona, Account No. 25-873.
 - i. A bank account in the name of Ferris Alexander, Edward Alexander and/or The American Book Wholesalers with the First Bank - St. Anthony Falls, Account No. 706-2051-334.
 - j. A bank account in the name of Haista Paska, Inc., d/b/a Video Hits, with the First Bank - St. Anthony Falls, Account No. 206-3027-052.
 - k. A bank account in the name of A.B. Video with the First Western State Bank, Account No. 44-057.
 - l. A bank account in the name of United States Video, Inc., and A.B. Distributors with the First State Bank of St. Paul, Account No. 15-05-510.
 - m. A bank account in the name of Video Hits with the Union Bank and Trust Co., Account No. 101085400.
 - n. A bank account in the name of Haista Paska, Inc. d/b/a Video Hits with the First Bank - St. Anthony Falls, Account No. 206-3027-052.
 - o. A bank account in the name of Video Hits with the Merchants National Bank of Winona, Account No. 7-173.
2. All rights, interests, holdings and claims in a non-corporate business entities known as:
- The Flick
The Wabasha Bookstore a/k/a The Wabasha

Adult Bookstore
The Lake Street Bookstore
The Adult Entertainment Center
Chicago-Lake Bookstore
American Empress Theater and Bookstore
a/k/a American Bookstore
Nicola's Bookstore
East Hennepin Video Book & Theater
Broadway Book I
Broadway Book II
Joey's Adult Bookstore
The Ultimate Bookstore
Video Hits, Winona

including inventory, equipment and furnishings.

- 3. The above-mentioned bank accounts and all funds credited to the accounts as of the date of this indictment and traceable from the accounts as of the date of and subsequent to the indictment together with the contents of any safe deposit box maintained by and on behalf of Ferris J. Alexander.
- 4. The following personal property and the proceeds thereof: all 8 mm projectors, television monitors, coin boxes and their contents, safes, video cassette tape players, video cassettes, magazines, other printed material, shelving and display material, chairs, tables, office equipment and furniture, cash registers and their contents, U.S. currency, computers, adding machines, and other inventory.
- 5. The following motor vehicles: a 1986 Dodge Van, Vehicle Identification No. 2B7FB13H8GK534657; a 1985 Chevrolet Van, Vehicle Identification No.

2GCEG25H2F416185; a 1976 EZ-Load Trailer, Vehicle Identification No. 61200D.

6. All monies acquired, maintained, or constituting proceeds which the defendant obtained, directly or indirectly, from racketeering activity in violation of Section 1962 for the years 1985, 1986, 1987 and 1988 as follows:

(1) 1985 - \$2,011,543.58
 (2) 1986 - \$1,856,820.52
 (3) 1987 - \$2,484,845.00
 (4) 1988 - \$2,557,339.00
 TOTAL - \$8,910,548.10

Following a full hearing conducted on November 8, 1990 pursuant to Title 18, United States Code § 1963 (1) (6) at which all petitions regarding the subject property were considered, and this Court further taking into consideration the record of the criminal trial which resulted in its Order of Forfeiture, the Court makes the following findings of fact, conclusions of law, and order:

1. This Court has jurisdiction of the petitioners asserting legal interests in the real property and to adjudicate the validity of their claimed interests.

2. The United States provided direct Notice of the Order and Judgment of Forfeiture, its intent to dispose of the property, and the rights of third parties to petition the Court for a hearing on their claims to the following persons and entities:

- a. Dolores Alexander
- b. Jefferey Alexander

- c. Caroline Alexander
- d. Robin Alexander
- e. Susan Alexander
- f. Ferris J. Alexander, Jr.
- g. Gust Alexander
- h. State of Minnesota
- i. Hennepin County
- j. Olmsted County
- k. Winona County
- l. Centraire, Inc.
- m. George Brumm
- n. Harry & Elaine Endthoff
- o. Alta Herrick
- p. Leona Peterson
- q. Donald Bundlie
- r. St. Paul Housing Authority
- s. Minneapolis Community Development
- t. U.S. Video, Inc.

2. The United States published Notice of the Order and Judgment of Forfeiture, of its intent to dispose of the property, and the rights of third parties to petition the Court for a hearing on their claims in the following newspapers of general circulation:

- a. Minneapolis Star Tribune from August 19 to September 2, 1990.
- b. St. Paul Pioneer Press from August 20 to September 3, 1990.
- c. Finance and Commerce from August 17 to August 31, 1990.
- d. Rochester Post Bulletin from August 21 to September 4, 1990.
- e. Winona Daily News from August 21 to September 4, 1990.

3. The following persons or entities filed petitions with this Court and requested a hearing as to the validity of their claims of legal interest:

- a. Dolores A. Alexander on September 6, 1990 – claim to any proceeds in a Video Hits Bank Account located at the Union Bank and Trust Co.
- b. U.S. Video, Inc. on September 12, 1990 – claim to personal property stored at 311-315 East Lake Street, Minneapolis, Minnesota.

4. With respect to the petition of Dolores A. Alexander, this Court specifically finds that the claimant has not established that she has any present legal right, title or interest in the subject property.

5. With respect to the petition of U.S. Video, Inc., this Court specifically finds that the petitioner is entitled to take possession of and remove all personal property identified on the stipulated inventory as having been stored by the petitioner at 311-315 East Lake Street, Minneapolis, Minnesota.

6. That it appears from the record that no other claims, contested or otherwise, have been filed with respect to the subject property described in paragraph 11 through 28 of this Court's August 6, 1990 Order and Judgment of Forfeiture within thirty days of publication by the United States of Notice of said Order.

IT IS HEREBY ORDERED, ADJUDGED and DECREED:

1. That the personal property is condemned and forfeited to the United States except as provided in the

stipulation filed with the Court as to the claim of U.S. Video, Inc.

2. That the United States has clear title to the above-described personal property and may warrant good title to any subsequent purchaser or transferee by U.S. Marshal's Deed.

3. That the United States Attorney General or his designated agent shall direct the disposition of the property by sale or other commercially feasible means and the proceeds of any sale or other disposition of the property shall be used to pay all proper expenses for the forfeiture and the sale, including expenses of seizure, maintenance and custody of the property pending its disposition, advertising, and court costs.

4. That the United States Attorney General or his designated agent shall deposit any remaining proceeds from the sale of the forfeited property into the Treasury pursuant to Title 18, United States Code § 1963 (f).

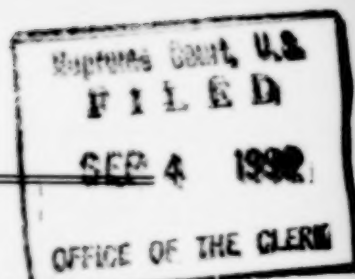
The Clerk is hereby directed to send copies of this Order to all counsel of record and the United States Marshal.

LET JUDGMENT BE ENTERED.

Dated: January 28, 1991

/s/ James M. Rosenbaum
JAMES M. ROSENBAUM,
Judge
United States District Court

No. 91-1526



In The
Supreme Court of the United States
October Term, 1992

FERRIS J. ALEXANDER, SR.,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Eighth Circuit

BRIEF OF PETITIONER

JOHN H. WESTON*
G. RANDALL GARROU
CATHY E. CROSSON
CLYDE F. DEWITT
WESTON, SARNO, GARROU
& DEWITT
433 N. Camden Drive,
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QUESTIONS PRESENTED

- 1) Does RICO forfeiture constitute a prior restraint of the kind condemned in *Near v. Minnesota*, or otherwise violate the First Amendment, when applied to close a \$25 million chain of bookstores, video stores, and theaters to confiscate all their property including four years' proceeds, and to destroy their inventories, solely on the basis of seven obscene videotapes and magazines?
- 2) Does the forfeiture of a \$25 million media business, along with a six-year prison term and fines in excess of \$200,000, all as punishment for seven obscene videotapes and magazines, violate the Eighth Amendment?

LIST OF PARTIES

Petitioner FERRIS J. ALEXANDER, SR. and Respondent UNITED STATES OF AMERICA are the only interested parties remaining in this action. Petitioner previously notified this Court of his belief that his co-defendants in the criminal trial below (Delores Alexander, Jeffrey Alexander, and Wanda Magnuson), did not pursue this matter on appeal and no longer have an interest in the outcome of this proceeding. Similarly, a civil case entitled *Alexander v. Thornburgh*, was consolidated with this case in the Court of Appeals. However, the petition for certiorari did not seek review of the civil case and it is petitioner's understanding that no parties thereto seek this Court's review of that case.

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No. 91-1526

In The
Supreme Court of the United States
 October Term, 1992

FERRIS J. ALEXANDER, SR.,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari
 To The United States Court Of Appeals
 For The Eighth Circuit

BRIEF OF PETITIONER

OPINIONS BELOW

The opinion of the Court of Appeals is reported as *Alexander v. Thornburgh*, 943 F.2d 825 (8th Cir. 1991), and is reproduced at page 1 of the Appendix to the Petition for Writ of Certiorari (hereinafter "C.A."). The Court of Appeals' unreported order denying rehearing and rehearing *en banc* is set forth at C.A. 163. The District Court's reported opinion deciding the forfeiture issue, *United States v. Alexander*, 736 F.Supp. 968 (D. Minn. 1990), is reproduced at C.A. 163; its unpublished Judgment Including Sentence Under The Sentencing Reform Act is reproduced at C.A. 125. The District Court's forfeiture order of August 6, 1990 is reproduced at C.A. 134 and its final orders of forfeiture appear in the record as docket entry nos. 273 and 282-291.

JURISDICTION

This Court granted a writ of certiorari to review the decision of the United States Court of Appeals for the Eighth Circuit affirming Petitioner's conviction and sentence of forfeiture. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First and Eighth Amendments to the United States Constitution are reproduced at C.A. 164. The forfeiture provisions of the federal RICO statute (18 U.S.C. § 1963) are reproduced in their entirety in the Appendix at the end of this brief.

STATEMENT OF THE CASE

This case starkly presents the issue whether the government may, consistent with the First and Eighth Amendments, invoke the forfeiture provisions of the RICO Act, 18 U.S.C. § 1963, to confiscate entire media businesses in retaliation for obscenity offenses. Solely because seven items (four magazines and three videotapes) were found obscene at trial, the government used these provisions to dismantle and destroy Petitioner's chain of bookstores and video stores. Even before this Court acted on the certiorari petition, the government sold most of the real property which housed these media businesses, and burned their inventories of books and films.

Petitioner Ferris Alexander formerly owned and operated numerous bookstores, video stores and theaters in Minnesota, primarily in the Minneapolis/St. Paul area. He also distributed books, magazines, and videotapes wholesale. These businesses were largely devoted to selling or renting erotic materials, presumptively protected by the First Amendment and which Petitioner believed to be within local community standards.¹

¹ Petitioner's businesses were notably successful: the government alleged that their annual revenues were in the millions of dollars. In addition to the local popularity of the erotic materials his businesses

In 1989, however, the government charged Petitioner with multiple obscenity and RICO/obscenity violations. The indictment (R.1)² charged 34 obscenity counts based on the alleged obscenity of six magazines and seven videotapes, and three RICO counts predicated exclusively on those obscenity charges.³

Petitioner challenged obscenity-predicated RICO forfeitures in his pre-trial motions, and Magistrate Janice Symchych initially held the forfeiture provisions of 18 U.S.C. § 1963 facially unconstitutional for overbreadth, on grounds that they authorize the wholesale forfeiture of expressive businesses without regard for the censorial consequences thus visited upon protected speech. *United States v. Alexander*, 736 F.Supp. at 986-987. (C.A. 72-74.) Citing the numerous federal decisions striking down padlocking orders and license revocations as overly broad penalties for obscenity convictions, the magistrate also concluded that RICO forfeitures operate as an impermissible prior restraint. 736 F.Supp. at 989-991. (C.A. 78-81.) She therefore recommended that the trial court hold RICO forfeiture facially unconstitutional as a prior restraint. *Id.* at 981, 988, 990. (C.A. 58, 81, 119.)

The district court, however, held that the RICO forfeiture remedy was neither overbroad nor a prior restraint, on

offered for sale and rental, official acquiescence reinforced Petitioner's belief that the materials he disseminated were within the bounds of community standards. He had not been prosecuted since he was acquitted of obscenity charges in the mid-1970's, and local officials had subsequently announced that they would not prosecute for obscenity unless the materials involved bestiality or children. Nor, prior to the alleged conduct in this case, had there been any federal obscenity prosecutions in the district since his earlier acquittal.

² "R." refers hereinafter to district court docket entries.

³ The indictment also alleged tax offenses, and Petitioner was convicted of four tax violations. Those convictions are immaterial to the issues before this Court, as they were completely unrelated to the RICO counts and the resulting forfeiture.

grounds that the First Amendment imposes no limitation on the penalties the government may exact for obscenity offenses. 736 F.Supp. at 978-980. (C.A. 51-55.) The trial court deemed the First Amendment irrelevant, because "the law . . . treats an obscenity charge the same as any other criminal charge, be it bank robbery, narcotics trafficking, or firearms violations." *Id.* at 980. (C.A. 55.)

The court also discerned in the impending wholesale forfeiture of Petitioner's bookstores, theaters, and video stores "no necessary impact on expressive activity in the future." *Id.* (C.A. 54.) In fact, these forfeitures ultimately closed virtually every adult erotica outlet in the Twin Cities area.

Following a jury trial, Petitioner was acquitted on 16 obscenity counts and convicted on 18 counts, based on the determination that seven of the thirteen charged items – slightly more than half – were obscene. Based exclusively upon these seven obscene items Petitioner was also convicted of the three RICO/obscenity counts. (C.A. 125.)

For these offenses, the ailing 73-year-old Petitioner was sentenced to concurrent terms requiring his incarceration for six years. The trial court also assessed him well over \$200,000 in fines and costs. (C.A. 127-128, 132, 133, 162.) In ordering Petitioner to pay the costs of prosecution, the court dismissed the fact that it was dismantling an entire chain of communicative businesses with: "Defendant created his criminal empire and now must pay for its destruction." (C.A. 162.)

In addition to these harsh criminal penalties, however, 18 U.S.C. § 1963(a) required the trial court to order a total forfeiture,⁴ extending to Petitioner's entire chain of retail

⁴ Title 18 U.S.C. § 1963(a)(1)-(2) compel the trial court to order forfeiture of any interest a convicted RICO defendant has acquired or maintained in violation of § 1962, and any interest in, security of, claim against, or property affording a source of influence over any enterprise which has been conducted in violation of § 1962. Together, these sections

bookstores and video stores, along with his wholesale media distribution business which warehoused an extensive inventory. The forfeiture order of August 6, 1990, basically encompassed all of the assets associated with Petitioner's ten operating wholesale and retail media businesses, including the real estate that had housed them, their bank accounts, and all the personal property necessary to conduct these businesses. Included in the latter category were film projectors, television monitors, video cassette players, cash registers, shelves, all office equipment, and three company vehicles (two vans and a trailer) used to transport media materials. Most dramatically in terms of its direct and immediate impact upon expression, the forfeiture order authorized the government to confiscate these bookstores' and video stores' existing inventories of untold thousands of books, magazines, and videotapes. (C.A. 134.)⁵

The court also ordered forfeiture of over \$8.9 million in cash assets, under the government's theory that this amount constituted proceeds obtained from "racketeering activity"

require the blanket forfeiture of the enterprise and were so applied in this case to completely extirpate Petitioner's speech businesses.

The language of § 1963(a)(3) appears to require forfeiture only of property constituting or derived from proceeds obtained from "racketeering activity," and if properly construed as limited to the actual proceeds from the sale of the seven obscene items, Petitioner would not challenge the constitutionality of this provision. However, the trial court applied this provision to forfeit a wide range of assets, particularly the \$8.9 million alleged as proceeds from the overall conduct of the enterprise for four years. *See* C.A. at 144-145. As the courts below construed this provision, it too is challenged as unconstitutional.

⁵ Technically, the forfeiture order of August 6, 1990 simply ordered the forfeiture of *petitioner's interest* in all of the assets described above (as well as some other properties not mentioned here). Final orders of forfeiture were subsequently entered as against the entire world (R.273 and 282-291). These final orders of forfeiture included all the items specifically described above.

from 1985 through 1988, even though all but seven of the hundreds of thousands of items sold over that period were presumptively protected materials.

The Eighth Circuit Court of Appeals affirmed Petitioner's conviction, rejecting his arguments that RICO forfeiture of an entire expressive business for obscenity offenses violated the First and Eighth Amendments. (C.A. 21-25.) Relying entirely upon the Fourth Circuit's decision in *United States v. Pryba*, 900 F.2d 748 (4th Cir. 1989), the court concluded First Amendment analysis was simply irrelevant. *Alexander v. Thornburgh*, 943 F.2d 825, 834-835. (C.A. 21, 23.) The court apparently also adopted the Fourth Circuit's conclusion in *Pryba* that it need not review this sentence under the Eighth Amendment. *Id.* at 835-836. (C.A. 25.)

After the Eighth Circuit affirmed Petitioner's conviction, but before that court had even denied rehearing, the government destroyed all of the presumptively-protected inventories of books, films, and magazines it had seized from Petitioner's warehouse and nine retail outlets.⁶ Federal marshals in Minneapolis trucked three tons of magazines, videotapes, and other inventory to a garbage processing plant, where the magazines were burned and the videotapes destroyed by crushing.⁷

Additionally, despite the pending petition before this Court, the government sold most of Petitioner's real property as quickly as it could dispose of those properties by quitclaim deed. To date the government has sold nine of the ten parcels of real property; it has also sold virtually all of the businesses' equipment necessary for the future dissemination of

⁶ The RICO statute expressly prohibits *the defendant*, as opposed to third parties, from even *applying* for any type of stay order to preserve the forfeited assets pending the conclusion of any appeal. See 18 U.S.C. § 1963(f).

⁷ See *Minneapolis Star Tribune*, October 19, 1991 at 1B.

constitutionally-protected materials. Most recently, the government sold to the City of Minneapolis a parcel of Petitioner's real property appraised at \$145,000, for the price of \$1.⁸

The RICO Act does not require the government to provide an itemized inventory of the confiscated property. Accordingly, the government has never filed any document in this case itemizing the forfeited property or estimating its value. Because the government also seized Petitioner's business records, it is impossible to estimate accurately the total value of the property the government has sold or destroyed. However, Petitioner estimates the value of his forfeited businesses at \$25,000,000.⁹

SUMMARY OF ARGUMENT

When predicated solely on prior speech violations, the forfeiture provisions of the federal RICO statute represent a unique and dangerous threat to the security of First Amendment freedoms, not only for the erotic entertainment industry, but for all communications businesses. In this case, pursuant to the mandatory forfeiture provisions of 18 U.S.C. § 1963, the government seized and destroyed all of the countless thousands of magazines, books and video tapes from petitioner's wholesale warehouse and nine separate bookstores and video stores solely because seven of thirteen charged items were found obscene at trial. None of the other thousands of destroyed media items were even *alleged* to be obscene. In addition to the mass destruction of these untold thousands of media materials, the government has also confiscated and sold almost all the real and personal property necessary for the business prospectively to disseminate constitutionally protected expression.

⁸ This transaction involved property at 341 E. Lake St. in Minneapolis and closed on July 29, 1992, one month after certiorari had been granted.

⁹ This is the estimated combined value of the hard assets of the businesses and the businesses' value as going concerns.

The Court of Appeals upheld this mass destruction of a media business upon the erroneous theory that the First Amendment imposes no limitation upon the scope of punishment which government may exact once it has obtained two or more obscenity convictions. Yet, in *Arcara v. Cloud Books, Inc.*, 478 U.S. 697 (1986), this Court, while upholding a closure of a bookstore for prostitution and lewd conduct, nonetheless emphasized that had the triggering violations involved expression (such as, *e.g.*, obscenity), First Amendment scrutiny would be required. Similarly, in *Fort Wayne Books v. Indiana*, 489 U.S. 46, 67 (1989), this Court made clear that "the state cannot escape the constitutional safeguards of our prior cases by merely recategorizing a pattern of obscenity violations as 'racketeering.'" The Court invalidated RICO seizures, concluding that "[i]t is incontestable that these proceedings were begun to put an end to the sale of obscenity . . . , and hence we are quite sure that the special rules applicable to removing First Amendment materials from circulation are relevant here" *Id.* at 66. In light of these clear statements by this Court, the Court of Appeals' conclusion that First Amendment considerations are irrelevant here is plainly unsupportable.

In fact, the government's mass destruction of expressive businesses in this case was "the essence of censorship," *i.e.*, a prior restraint, just as in *Near v. Minnesota*, 283 U.S. 697, 713 (1931), where the invalid statute authorized the courts to suppress "the dissemination of future issues of a publication because its past issues had been found offensive." Unlike a typical criminal punishment, the draconian sanction challenged herein directly suppressed expressive materials and the means to disseminate them. Rather than simply jailing or fining the Petitioner (which occurred in any event), the forfeiture provisions focused on suppression of his media business.

The fundamental error committed by the Court of Appeals was to accept the government's assertion that, under *Near*, forfeiture cannot be a prior restraint because it was imposed as "subsequent punishment" in a criminal case. However, *Near* suggested nothing of the sort. *Near* stated: "We have no occasion to inquire as to the permissible scope of

subsequent punishment" (283 U.S. at 715, emphasis added), clearly implying that there was some tangible First Amendment limit as to how far subsequent punishment may go. Obviously the same First Amendment principles this Court protected in *Near* would be violated if the very same sanction stricken in *Near* were authorized by a *criminal* statute. Accordingly, the criminal-civil distinction is unquestionably an inappropriate formalistic test and the Court of Appeals clearly erred in adopting it.

Rather, this Court's prior restraint cases suggest that the only appropriate test for distinguishing a prior restraint from a permissible punishment is that a sanction is an unconstitutional prior restraint if *it is imposed for a prior speech violation and in every case where the statutory sanction is imposed, it will immediately or inevitably suppress speech*. Because of this critical distinction, RICO forfeiture operates as an unconstitutional prior restraint rather than a permissible criminal punishment.

Recognition of this distinction is critical if basic First Amendment protections – both for individuals and communications businesses – are to survive. For example, if the challenged forfeiture were upheld, there would be no barrier to expansion of the types of speech which could trigger forfeiture, to include "national security violations," "disseminating unauthorized or classified information", or defamation. Surely the First Amendment would not permit forfeiture of a newspaper or broadcast network which committed such a violation.

To sustain RICO forfeiture is to eviscerate the most bedrock First Amendment principle: that government may not preclude future, presumptively protected speech in retaliation for prior unprotected speech. In essence, this case represents a fundamental crossroads for liberty of the press in this country. If the forfeiture of a media business for prior speech violations is not unequivocally rejected as an unconstitutional prior restraint, laws empowering government to forfeit speech businesses for prior speech violations will surely proliferate. The First Amendment, as we know it, will simply cease to exist.

Alternatively, massive forfeitures as a remedy for unprotected speech are also overbroad because they inevitably operate to censor protected speech. In contrast to the typical overbreadth case where a law's prohibition includes protected speech, here the proscribed conduct is *all* unprotected but the *sanction* imposed for the violation is impermissibly overbroad, in violation of First Amendment rights. *See, e.g., NAACP v. Alabama*, 377 U.S. 288, 307-308 (1964).

Finally, although Petitioner's First Amendment claims should dispose of this case, the forfeitures imposed here violate the Eighth Amendment guarantees against "excessive fines" and "cruel and unusual punishment." The forfeiture of Petitioner's \$25-million business, in addition to a six-year prison term and some \$200,000 in fines, is grossly disproportionate to the offense of distributing seven items found to be obscene. Moreover, such forfeitures inherently violate the Eighth Amendment because they revive the hated and much-abused "forfeiture of estate" which the framers clearly sought to abolish.

ARGUMENT

I. THE FORFEITURE AND CLOSURE OF AN ENTIRE MEDIA BUSINESS, ALONG WITH THE DESTRUCTION OF ITS INVENTORY, SOLELY FOR THE SALE OF SEVEN OBSCENE ITEMS, VIOLATES THE FIRST AMENDMENT BOTH AS AN UNCONSTITUTIONAL PRIOR RESTRAINT AND BY ITS OVERBREADTH.

By deploying RICO forfeiture to destroy a media business of which it disapproves, the government presents this Court with an unprecedented assault on First Amendment liberties. The government has targeted a communicative business for destruction, and solely on the basis of seven items determined at trial to be obscene, has invoked the ultimate censorial weapon: RICO's blanket forfeiture. By means of this forfeiture, the government has closed down an entire chain of bookstores, theaters, and video-stores engaged in

erotic speech, to which the government is openly hostile. It has removed from circulation and burned or otherwise destroyed those businesses' vast inventories of books, magazines, and videotapes. It also forfeited and sold all the neutral real and personal property necessary for those businesses to engage in all future expressive activity.

The decision below, denying the relevance of the First Amendment in order to sustain this forfeiture, defies the bedrock prohibition against prior restraint this Court announced in *Near v. Minnesota*, 283 U.S. 697 (1931), and opens the door wide to governmental suppression of officially-disfavored speech. If this Court were to affirm, and to condone this forfeiture and book-burning, it would signal a seismic shift in First Amendment doctrine. For the first time, it would unleash government to employ whatever remedies it chooses to punish unprotected speech, no matter that the effect is to directly and indiscriminately preclude future, protected speech.

Petitioner's challenge invokes the traditional First Amendment axiom that government may not directly and indiscriminately ban future speech because of prior unprotected expression. Accordingly, forfeiture of a media business purchased by a drug cartel would be constitutionally permissible,¹⁰ whereas the forfeiture of petitioner's property must be invalidated.¹¹

¹⁰ The government has sought to obfuscate the scope of the legal issue regarding RICO/obscenity forfeiture, disingenuously contending that "if bookstores, newsstands, publishing houses, and the like were immune from forfeiture, drug lords and other criminals would waste no time in investing in those businesses, and insulating their criminal proceeds from seizure." (Cert. Opp. Br. at 6.) However, Petitioner challenges the constitutionality of RICO forfeiture *only* where predicated *exclusively* on obscenity violations. RICO forfeitures for drug crimes and other non-speech offenses would be unaffected by this Court's determination that, *as applied to obscenity*, RICO forfeiture is invalid. If drug money were invested in a video store, forfeiture would no more violate the First Amendment than did the padlocking order in *Arcara v. Cloud Books, Inc.*, 478 U.S. 697 (1986).

¹¹ Petitioner agrees that proceeds from the sale of materials adjudicated obscene would be forfeitable without offense to the First Amendment.

Any departure from this rule would fundamentally jeopardize expressive First Amendment rights throughout the country. For example, the obscenity conviction reversed in *Jenkins v. Georgia*, 418 U.S. 153 (1974),¹² would today be a RICO predicate offense permitting the government to confiscate the entire theater chain which exhibited the film, and even the Hollywood studio which produced it. If the government moved as aggressively as it has against Petitioner in this case, it would have already dismantled the Georgia theater and the Hollywood movie studio, burning their film libraries and quietclaiming the real property before this Court would ever have had a chance to rectify the error.

Similarly, both the present administration and local prosecutors have frequently threatened even mildly erotic materials such as *Penthouse* or *Playboy* magazine.¹³ Accordingly, should this Court uphold the forfeiture herein, emboldened prosecutors may well file RICO-obscenity charges against mainstream national bookstore or convenience store chains where one of their outlets ignored local prosecutorial threats and sold two issues of *Playboy*, *Penthouse* or *Cosmopolitan*, in a particularly prudish community. Based upon an obscenity verdict, the trial court would then be required to forfeit the

¹² In that case, the major studio film "Carnal Knowledge," starring Jack Nicholson, Candice Bergen and Ann Margaret, was found obscene by a Georgia jury, and the theater owner's conviction was affirmed by the Georgia Supreme Court. This Court reversed the conviction.

¹³ See, e.g., *Playboy Enterprises, Inc. v. Meese*, 639 F.Supp. 581 (D.D.C. 1986); *Council For Periodical Distributors Association v. Evans*, 642 F.Supp. 552 (M.D.Ala. 1986), *aff'd*, 827 F.2d 1483 (11th Cir. 1987); *Freedberg v. U.S. Dept. of Justice*, 703 F.Supp. 107 (D.D.C. 1988); *PHE, Inc. v. U.S. Dept. of Justice*, 743 F.Supp. 15 (D.D.C. 1990); and *U.S. v. PHE, Inc.*, 965 F.2d 848 (10th Cir. 1992).

entire enterprise, e.g., the entire local bookstore or convenience store, or even the national chain of stores.

Nor would the destruction of broad First Amendment rights be limited to erotic expression. If this Court were to adopt the government's incredibly dangerous argument, nothing would prevent government from passing new legislation effectuating a stranglehold on the press and other media. Predicates such as "jeopardizing national security," "disseminating unauthorized information" or defamation could all be added to RICO or become triggering events under separate statutes with forfeiture type remedies. Using such forfeiture laws, the government could then simply forfeit the entire assets of the offending newspaper company or broadcasting business.

Indeed, if outright forfeiture of media businesses for any violation of the criminal laws were found constitutionally unobjectionable, there would be no end to the list of predicate crimes that could be legislatively employed as triggering offenses. The point is simply that First Amendment standards of scrutiny *must* be employed where government seeks to utterly destroy a media business solely because of one or more prior speech violations.

A. The Court Of Appeals Erred In Refusing To Analyze These Sanctions Under The Heightened Levels Of Scrutiny Applicable In First Amendment Cases.

The Court of Appeals was able to sustain the forfeiture herein *only* by concluding that First Amendment concerns become irrelevant once the government has obtained an obscenity conviction. Following *United States v. Pryba*, 900 F.2d 748 (4th Cir. 1990), the Eighth Circuit panel unfortunately held that this egregious form of censorship does not implicate the First Amendment because "[o]bscenity is not protected . . . and a convicted racketeer may not launder his

dirty money by investing it in materials that involve protected speech.' " *Alexander v. Thornburgh*, 943 F.2d 825, 834-835.¹⁴

In sharp contrast to the approach taken by the Court of Appeals, this Court has consistently repudiated attempts to finesse the First Amendment by resort to "mere labels" (e.g., "racketeering activity"), holding that they cannot confer "talismanic immunity from constitutional limitations." *New York Times Co. v. Sullivan*, 376 U.S. 254, 269 (1964). In *Fort Wayne Books, Inc. v. Indiana*, 489 U.S. 46, 67 (1989), the Court reaffirmed this principle in a pre-trial seizure context, clearly mandating the application of First Amendment analysis in a RICO obscenity case: "[T]he state cannot escape the constitutional safeguards of our prior cases by merely recategorizing a pattern of obscenity violations as 'racketeering.'" The Court further noted:

"It is incontestable that these proceedings were begun to put an end to the sale of obscenity . . . , and hence we are quite sure that the special rules applicable to removing First Amendment materials from circulation are relevant here

"The fact that the [state's] motion for seizure was couched as one under the Indiana RICO law – instead of being brought under the substantive obscenity laws – is unavailing. As far back as the decision in *Near v. Minnesota ex rel. Olson*, . . . this Court has recognized that the way in which a restraint on speech is 'characterized' . . . is of little consequence. . . . For example, in *Vance v. Universal Amusement Co.*, 445 U.S. 308 (1980), we struck down a prior restraint placed on the exhibitions of films under a Texas 'public nuisance' statute, finding that its failure to comply with our prior case law in this area was a fatal defect." *Id.* at 66. (Citations omitted.)

¹⁴ Of course, as noted above, Petitioner neither seeks the right to "launder . . . dirty money," nor disputes that proceeds from the sale of specific materials determined to be obscene would be forfeitable.

Fort Wayne Books thus reaffirmed an essential principle of *Near v. Minnesota*: that the Court will "cut through mere details of procedure" to analyze realistically "the operation and effect of the statute in substance." 283 U.S. at 713. *See also Kingsley Books v. Brown*, 354 U.S. 436, 441 (1957) ("The judicial angle of vision in testing the validity of a statute . . . is 'the operation and effect.'") As Justice White wrote in *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 68 (1981), "the standard of review is determined by the nature of the right assertedly threatened or violated rather than by the power being exercised or the specific limitation imposed."

This Court most recently rejected formalistic attempts to avert First Amendment analysis in *Simon & Schuster v. New York Crime Victims Board*, ___ U.S. ___, 112 S.Ct. 501 (1991), addressing the same arguments to which the government resorts here. In *Simon & Schuster*, this Court held that even where the state seeks to deprive criminals convicted of *non-speech* offenses of "the fruits of their crime," any such remedy which targets and adversely impacts free expression must survive the most searching scrutiny. Invalidating New York's "Son of Sam" law, which required that any publisher or other "entity" pay over to the Crime Victims Board any funds it owed a person "accused or convicted of a crime" under a contract to produce a book or other work describing the crime, this Court dismissed arguments that First Amendment scrutiny should not apply.

The state maintained that the discriminatory burden on certain speech did not trigger First Amendment scrutiny because the legislature did not *intend* to suppress speech about crime, much as the government has argued RICO forfeitures for obscenity are constitutionally immune because they allegedly are not intended to censor. The Court dismissed this contention as

"incorrect; our cases have consistently held that '[i]llicit legislative intent is not the *sine qua non* of a violation of the First Amendment.' . . . As we concluded in *Minneapolis Star*, '[w]e have long recognized that *even regulations aimed at proper*

governmental concerns can restrict unduly the exercise of rights protected by the First Amendment.' "
112 S.Ct. at 509. (Emphasis added.)

That the Court of Appeals erred in refusing to apply heightened First Amendment scrutiny is also demonstrated by this Court's opinion in *Arcara v. Cloud Books, Inc.*, 478 U.S. 697 (1986). In *Arcara*, this Court upheld the one-year closure of a bookstore due to repeated lewd conduct and prostitution on the premises. Although this Court concluded that First Amendment scrutiny was not required in analyzing the non-speech-predicated closure sanction, both the majority opinion and Justice O'Connor's concurrence emphasized that where, as here, a media business is to be permanently closed *for prior speech violations*, such a sanction *must* be analyzed under heightened First Amendment standards. The majority noted that a "criminal [or] civil sanction" *does* require First Amendment scrutiny "where it was conduct with a significant expressive element that drew the legal remedy in the first place, . . . or where a statute based on a nonexpressive activity has the inevitable effect of singling out those engaged in expressive activity." 478 U.S. at 706-707. As applied in obscenity cases, of course, RICO forfeitures *both* are triggered by expressive conduct *and* inevitably single out those engaged in expression.

Moreover, Justice O'Connor's concurrence in *Arcara* additionally emphasized that "[i]f . . . a city were to use a nuisance statute as a pretext for closing down a bookstore because it sold indecent books . . . , the cases would clearly implicate First Amendment concerns and require analysis under the appropriate First Amendment standard of review." *Id.* at 708. Clearly, every justice in *Arcara* agreed that full First Amendment standards of review are required when the predicate crime which triggers a closure order is obscenity.¹⁵

¹⁵ As the Ninth Circuit observed in *Adult Video Association v. Barr*, 960 F.2d 781, 792 (9th Cir. 1992), First Amendment standards of review come into play in reviewing RICO forfeitures based on obscenity, because

For all these reasons, the Court of Appeals unquestionably erred in concluding that First Amendment scrutiny is not applicable where the government has destroyed huge quantities of presumptively protected expression and has closed down and forfeited an entire network of media businesses, solely because seven of their thousands of media items were ultimately found obscene.

B. The Forfeiture And Closure of an Entire Media Business, Exclusively For Obscenity Violations, Is A Classic Prior Restraint Of The Sort This Court Has Condemned As A Per Se Violation Of The First Amendment Ever Since *Near v. Minnesota*.

1. Of the various types of prior restraint condemned by this Court, the *Near* type is the most unequivocal First Amendment violation.

This Court has stricken a variety of governmental actions and laws as invalid prior restraints. One of the clearest examples of prior restraint is a law requiring a license as a prerequisite to engage in all future presumptively protected speech activities. These laws are prior restraints,¹⁶ but will be

of "concern for protecting the public's right to receive, as well as the defendant's right to engage in, non-obscene speech."

"The forfeiture of assets derived from drugs, arson, fraud and murder rarely, if ever, implicates a public right of access to information. The forfeiture of assets loosely affiliated with obscenity offenses, by contrast, hurts not just the defendant, but also those members of the public who wish to obtain sexually explicit and erotic videotapes. Government 'is not free to adopt whatever procedures it pleases for dealing with obscenity . . . without regard to the possible consequences for constitutionally protected speech.' " *Id.*, quoting *Marcus v. Search Warrant*, 367 U.S. 717, 731 (1961).

¹⁶ See, e.g., *Forsyth County v. Nationalist Movement*, ___ U.S. ___, 112 S.Ct. 2395, at 2401 (1992), and cases there cited.

upheld if, facially, they allow no substantive discretion to the licensor, and state sufficiently brief and specific time limits within which the decision maker must grant or deny the license. See *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 225-229, (1990).

Another type of prior restraint is the "item-specific" prior restraint where government seeks to suppress the publication or exhibition of a *particular* expressive work. For example, in *New York Times v. United States*, 403 U.S. 713 (1971), the government sought to enjoin publication of the Pentagon Papers by *The New York Times* and *The Washington Post*. The government argued that publication of these papers, containing Vietnam War information, would jeopardize national security. Notwithstanding that argument, this Court adhered to the settled principle that "[a]ny system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity" (*id.* at 714) and that "[t]he Government 'thus carries a heavy burden of showing justification for the imposition of such a restraint.'" *Id.* Without rejecting the notion that such a restraint could ever be valid, this Court simply held that the government had not met its extremely heavy burden of justification.

Nonetheless, in other item-specific prior restraint cases, this Court has concluded that the government may overcome its heavy burden and prospectively prevent publication or exhibition of certain *specific items*, but only after they have been proven to be unprotected.¹⁷

The forfeiture involved in the present case falls into a third category of prior restraint which may be the most

¹⁷ See, e.g., *Kingsley Books v. Brown*, 354 U.S. 436 (1957), and *Freedman v. Maryland*, 380 U.S. 734 (1965), both of which involved procedures (injunction in *Kingsley*; individual film licensing in *Freedman*) for imposing restraints directly on *specific expression* found to be obscene. (Compare *R.A.V. v. City of St. Paul*, ___ U.S. ___, 112 S.Ct. 2538, 2543 (1992), (obscenity is "speech," but is suppressible speech.)

inimical to the First Amendment. Typified by the prior restraints condemned in *Near v. Minnesota*, 283 U.S. 697 (1931), and *Organization for a Better Austin v. Keefe*, 402 U.S. 415 (1971), this type of prior restraint is almost universally found unconstitutional because it imposes a *direct and indiscriminate restraint upon future expression* by a media business and does so exclusively because of past unprotected speech. It is the most unequivocal violation of the First Amendment, for which this Court has never accepted any attempted justification. As this Court summarized *Near* in the subsequent case of *Kingsley Books v. Brown*, 354 U.S. 436 (1957):

"Minnesota empowered its courts to enjoin the dissemination of future issues of a publication because its past issues had been found offensive. In the language of Mr. Chief Justice Hughes, 'this is of the essence of censorship.' 283 U.S. at p. 713. As such, it was unconstitutional." 354 U.S. at 445.

The reason these types of prior restraints are the most clearly unconstitutional is readily demonstrated by comparing them to the item-specific restraint stricken in *New York Times*. In *New York Times* this Court held that government must have an extremely compelling reason for prospectively restraining *even one item* of presumptively protected expression.

In sharp contrast, in the *Near* type of prior restraint, the government does not even *seek* a carefully limited restraint, much less attempt to justify one. Rather, it indiscriminately prohibits future presumptively protected expression simply as retaliation for a prior speech violation. Regardless of whether such a sanction may be characterized as "deserved punishment" for the individual or media business in question, the crucial feature, from a First Amendment standpoint, is that, *by focusing directly on the media materials*, the forfeiture order does not merely punish a wrongdoer, but deprives the public of access to large quantities of presumptively protected expression. Indeed, in the present case, the effect of these

forfeitures has been to eliminate virtually all outlets for erotic materials from the Minneapolis/St. Paul area.

This comparison of the *Near* and *New York Times* types of prior restraints highlights another important aspect of prior restraint doctrine. In prior restraint cases, this Court has always focused on *the speech that is restrained*, not on the speech that triggered the remedy. The latter may sometimes be enjoined or even destroyed, but protected or unspecified speech may not be.

2. **Because RICO forfeiture directly and indiscriminately suppresses future presumptively protected speech in retaliation for prior unprotected speech, this Court's decisions uniformly require its invalidation as an unconstitutional prior restraint.**

In *Near v. Minnesota*, this Court struck down a prior restraint constitutionally indistinguishable from RICO forfeiture. At issue was a statute which authorized an injunction against future publication in order to abate "malicious, scandalous and defamatory" periodicals as a public nuisance. "Minnesota empowered its courts to enjoin the dissemination of future issues of a publication because its past issues had been found offensive," as this Court later characterized the *Near* prior restraint in *Kingsley Books v. Brown*, 354 U.S. at 445.

Because *Near* had published defamatory matter in nine previous editions of his periodical, *The Saturday Press*, the trial court: (1) ordered the permanent abatement of *The Saturday Press*,¹⁸ necessarily prohibiting all future issues of that magazine whether or not they were defamatory; and (2) permanently enjoined the defendants from ever again publishing any scandalous or defamatory newspaper, whether under the title "*The Saturday Press*" or any other. 283 U.S. at 706. This

¹⁸ The trial court also temporarily restrained the defendants from publishing or circulating "any future editions of . . . *The Saturday Press*" pending trial. 283 U.S. at 704-705.

Court squarely held both speech-preclusive remedies unconstitutional: unprotected speech such as defamation could be punished subsequent to its publication, but not by restraining other presumptively protected speech in advance. For government to preclude future speech in response to past unprotected speech, said Chief Justice Hughes, is "the essence of censorship." 283 U.S. at 713.

The forfeiture here is a prior restraint of expression for at least three reasons. First, as to the countless thousands of magazines and videos which the government destroyed, only seven were found obscene. Accordingly, the overwhelming majority were presumptively protected expression which were suppressed before they were sold to the public and before any judicial determination that they lacked constitutional protection.

Second, by forfeiting both the ten parcels of real property at which these businesses existed, as well as all of the equipment necessary to operate these businesses (e.g., cash registers, shelves, video projectors, etc.), the government directly prevented these businesses from disseminating and continuing to disseminate any other constitutionally protected materials in the future. Accordingly, the forfeiture of these businesses accomplished an extremely effective prior restraint of the future expressive activity of these businesses, indistinguishable from the prior restraint impact of the abatement order stricken in *Near*.

Third, the forfeited bank accounts and proceeds of the businesses seized under 18 U.S.C. § 1963(a)(2) and (3), also constituted a prior restraint. The statutory term "proceeds," as construed by the government, is extremely broad, representing gross receipts rather than mere profits. The forfeiture of any media business' gross revenues over a lengthy period¹⁹ will unquestionably force its closure, necessarily preventing

¹⁹ The four years of gross revenues forfeited in the present case seems typical, involving forfeiture of all revenues obtained during 1985 through 1988. C.A. 144.

all of the business' future speech activities. Accordingly, forfeiture of proceeds is a prior restraint as well.

As early as *Near*, this Court dismissed the government's present arguments. The Court made clear that a blanket prospective restraint is not "punishment in the ordinary sense, but suppression." *Id.* at 711. "Subsequent punishment for such abuses as may exist is the appropriate remedy, *consistent with constitutional privilege*," i.e. the right to be free from restraints upon protected or unspecified speech. *Id.* at 720.

For all the reasons articulated in the landmark *Near* opinion, both this Court and the state and lower federal courts have consistently enforced as a per se rule the *Near* prohibition against broad prospective restraints upon presumptively protected expression in retaliation for prior speech violations. Because the lower courts have so universally repudiated the particular species of prior restraint rejected in *Near*, cases of this type have rarely reached this Court.

Forty years after *Near*, another case came before this Court involving a broad and direct prospective restraint upon presumptively protected expression. In *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 417 (1971), a real estate broker obtained an injunction to prevent the Organization For A Better Austin "from passing out pamphlets, leaflets or literature of any kind, and from picketing." The organization had severely criticized the realtor for "blockbusting" tactics, and he asserted that their picketing and leafletting violated his rights to privacy. In striking the order down as an impermissible prior restraint, this Court emphasized that the doctrine of prior restraint prohibits this type of open-ended order *regardless of whether the predicate speech was protected or unprotected*:

"It is elementary, of course, that in a case of this kind the courts do not concern themselves with the truth or validity of the publication. Under *Near v. Minnesota*, . . . the injunction, so far as it imposes prior restraint on speech and publication, constitutes an impermissible restraint on First Amendment rights. Here, as in that case, the injunction operates . . . to suppress, on the basis of previous

publications, distribution of literature 'of any kind.'" *Id.* at 418. (Emphasis added.)

As these cases make clear, whether a remedy – be it an injunction, denial of a license, or forfeiture – constitutes a prior restraint does not turn upon the speech which triggered the remedy, but rather upon *what is restrained*. A remedy which indiscriminately precludes future protected or unspecified speech operates as a prior restraint, and the fact that it is triggered by unprotected or illegal speech does not insulate it from First Amendment review.

Reaffirming this principle in *Kingsley Books, Inc. v. Brown*, 354 U.S. 436, 441 (1957), this Court upheld a civil injunctive procedure whereby the state could restrain the dissemination of specific books judicially determined to be obscene. The Court expressly distinguished this narrow injunctive remedy from the broad prior restraint condemned in *Near*, noting that the trial judge had "refused to enjoin 'the sale and distribution of later issues' [of the obscene books] on the ground that 'to rule against a volume not offered in evidence would . . . impose an unreasonable prior restraint upon freedom of the press.'" *Id.* at 439. Observing that the state had "studiously withh[eld] restraint upon matters not already published and not yet found to be offensive," the Court reaffirmed that such a restraint would be "the essence of censorship." *Id.* at 445, quoting *Near*.

Indeed, many opinions of this Court have echoed the concept articulated in *Near* and *Keefe* that the protections of the First Amendment do not disappear where unlawful expression is being punished. As recently as this Court's decision in *R.A.V. v. City of St. Paul*, ___ U.S. ___, 112 S.Ct. 2538 (1992), Justice Scalia, writing for the majority, noted that even when government undertakes to regulate speech within one of the narrow "proscribable categories," such as obscenity, it must do so with due regard for the broader principles of the First Amendment. To say that obscenity and libel constitute categories of speech which may be censored is not to say "that they are categories of speech entirely invisible to the Constitution." 112 S.Ct. at 2543. "Our cases surely do not establish the proposition that the First Amendment imposes no obstacle

whatsoever to regulation of particular instances of proscribable expression, so that government 'may regulate [them] freely.'" ²⁰ *Id.* at 2543.

Similarly, in *Simon & Schuster, supra*, this Court struck a law under the First Amendment even though it was challenged by one whose triggering crime was murder, clearly a nonspeech violation. Simply stated, this Court has consistently ruled that First Amendment considerations do not evaporate merely because the triggering conduct may have been unlawful.

Here, the government has violated an even more bedrock principle of First Amendment law than the ban on content-based discriminations invoked in *R.A.V.* and *Simon & Schuster*.²¹ In the *Near* prior restraint situation, as discussed above, where government indiscriminately precludes future protected or unspecified speech, the unlimited nature of the remedy is its greatest essential evil. If there is *any* per se rule limiting governmental interference with speech, it is the *Near* rule that past speech abuses may not be redressed by measures which directly and indiscriminately prevent disseminating presumptively protected expression in the future.

This Court has also invalidated laws which impose a greater *burden* on speech-related businesses than on others. See, e.g., *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575 (1983); and *Arkansas Writers Project v. Ragland*, 481 U.S. 221 (1987). The Court, discerning the potential for governmental control of speech through unequal taxation, struck the tax laws in those cases,

²⁰ Along the same lines, in *Smith v. California*, 361 U.S. 147, 155 (1959), this Court recognized: "The existence of the State's power to prevent the distribution of obscene matter does not mean that there can be no constitutional barrier to any form of practical exercise of that power."

²¹ As this Court stated in *Minneapolis Star*: "Prior restraints . . . clearly strike to the core of the Framers' concerns, leading this Court to treat them as particularly suspect." 460 U.S. at 583, n.6.

in order to prevent injury to important First Amendment rights.

Yet RICO forfeiture inflicts *far* graver injury to First Amendment rights than the discriminatory taxation schemes in *Ragland* and *Minneapolis Star*. The RICO forfeiture remedy operates not just as a *burden* but as a *ban* on future speech. Whereas the unfair taxation of businesses in *Ragland* and *Minneapolis Star* could tend to deter speech, it has nowhere near the absolutely *preclusive* impact of RICO forfeiture.

The controlling principle is that whether a sanction violates the First Amendment must be based upon "the operation and effect of the statute in substance." *Near*, 283 U.S. at 713. Since the operation and effect of the laws stricken in *Minneapolis Star* and *Ragland* was unconstitutional, a fortiori the operation and effect of a complete *ban* on future expression solely because of prior speech violations must also be unconstitutional.

Moreover, this Court need not speculate about the operation and effect of RICO forfeiture. Not only is the effect of this statute apparent from the present facts (e.g., the virtual elimination of erotic media stores in the Twin Cities and the massive destruction of presumptively protected media materials), this total destruction of a media business was both the Justice Department's clearly intended purpose²² and also consistent with Congress' intent in

²² While an illicit motive "is not the *sine qua non* of a violation of the First Amendment," *Minneapolis Star*, 460 U.S. at 592, nonetheless, where the government has clearly pursued these remedies for the improper purpose of destroying both protected sexually oriented expression to which it is overtly hostile as well as unprotected expression, it commits the clearest possible violation of the First Amendment. (See, e.g., Justice O'Connor's concurrence in *Arcara* expressing the view that if government "were to use a nuisance statute as a pretext for closing down a bookstore because it sold indecent books . . . the case would clearly implicate First Amendment concerns. . . ." 478 U.S. at 708.)

Here, evidence of the executive branch's censorial purpose is abundant. First, in a typical RICO forfeiture, the only seized property which the government will actually *destroy* is that which is contraband. By destroying, rather than selling, this vast inventory of presumptively protected

enacting this forfeiture statute, *i.e.*, to *permanently disable* any media enterprise found to have committed two or more obscenity violations.²³ This disabling statutory purpose has certainly been thoroughly effectuated in the present case.

Because a broad prospective restraint such as RICO forfeiture so universally violates core First Amendment principles, this Court has essentially treated the *Near* type prior restraint as a *per se* constitutional violation. In neither *Near* nor *Keefe* did this Court hesitate to condemn the prospective restraints outright, nor did any member of the Court even suggest that a compelling interest analysis was required.

expression (and, indeed, by doing so before this Court could even provide appellate review), the government has clearly manifested a censorial desire to remove all sexually oriented materials from public access, regardless of their protected status.

Additionally, in the usual RICO forfeiture, the government sells the forfeited business intact, allowing unrelated third parties to lawfully operate the business in the future. In this case, however, the government chose to dismantle these presumptively protected businesses by separately selling all of the real and personal property necessary to operate them. Indeed, these businesses were far more valuable as going concerns than when "sold for parts." Recently the government quitclaimed one of petitioner's parcels of real estate appraised at \$145,000 by the U.S. Marshal for the mere sum of \$1. This conduct demonstrates a clearly unconstitutional purpose to prevent the sale of *all* sexually oriented materials, not merely those which are obscene. This is censorship at its worst.

Finally, additional evidence of the government's desire to suppress constitutionally protected materials dealing with sex is found in the collection of cases referenced in note 13, *supra*.

²³ As this Court recognized in *Russello v. United States*, 464 U.S. 16, 26-29 (1983), Congress' purpose in enacting the RICO statute was to destroy a RICO enterprise by making "an attack . . . on their source of economic power itself." (*Id.* at 27.) The forfeiture provision "was intended to serve all the aims of the RICO statute, namely, to 'punish, deter, incapacitate, and . . . directly to remove the corrupting influence from the channels of commerce.'" *Id.* at 27-28.

Regardless of whether this Court should adopt Justice Kennedy's suggestion of a *per se* rule against content-based discriminations²⁴, this Court has *always* adhered to such a rule when examining prior restraints of the *Near* variety. Because a contrary rule would allow government enormous discretion to stifle disfavored speech and speakers prospectively, this Court has uniformly held that government may not punish unprotected speech by flatly prohibiting future presumptively-protected speech.

This Court's decisions prohibiting mass seizures of erotic materials provide additional support for facially invalidating RICO/obscenity forfeiture. See *Marcus v. Search Warrants*, 367 U.S. 717 (1961); *Quantity of Copies of Books v. State of Kansas*, 378 U.S. 205 (1964); see also *Heller v. New York*, 413 U.S. 483, 491 (1973); *Lo-Ji Sales, Inc. v. New York*, 442 U.S. 319, 327-328 (1979); *Fort Wayne Books, Inc. v. Indiana*, 489 U.S. 46, at 62-63 (1989), all expressly reaffirming the principles of *Marcus* and *Quantity of Books*.

The Court's common rationale in *Marcus* and *Quantity of Books* was that in the absence of procedures designed to focus searchingly on the obscenity of every item, mass seizures run the risk that some protected materials will be temporarily removed from circulation simply because they are present at the same location where obscene materials are sold. Although these cases involved *pre-judgment* seizures, their First Amendment rationale applies with even greater force to

²⁴ Compare Justice Kennedy's concurrence in *Simon & Schuster*, 112 S.Ct. at 512-515, where, in the context of the content-based discrimination presented by the Son-of-Sam law, he advocated adoption of a *per se* rule, rather than the compelling interest analysis applied by the majority. The rationale for such a rule was that to apply even a compelling-interest balancing test "might be read as a concession that States may censor speech whenever they believe there is a compelling justification for doing so." 112 S.Ct. at 513. To like effect, see Justice Kennedy's concurring opinion in *Burson v. Freeman*, ___ U.S. ___, 112 S.Ct. 1846, at 1858 (1992).

invalidate RICO forfeiture premised on obscenity violations. Here, protected materials are *permanently*, not temporarily, removed from circulation, simply because some obscene materials are found at the same location. The forfeiture herein simply cannot be squared with the underlying premise of both *Marcus* and *Quantity of Books*.

Finally, the Court of Appeals erred in adopting the government's assertion that RICO forfeiture is permissible because it is part of a criminal statute and may be characterized as "subsequent punishment" rather than a prior restraint. This distinction clearly misses the constitutional mark.

First, *Near* neither stated nor implied that the First Amendment permits all subsequent punishments for speech violations. Quite to the contrary, *Near* noted that no criminal punishment was involved in that case and then expressly stated: "*We have no occasion to inquire as to the permissible scope of subsequent punishment.*" 283 U.S. at 715 (emphasis added). Obviously, by stating that it had no occasion to inquire as to the *permissible scope* of subsequent punishment, this Court neither endorsed *all* subsequent punishments nor suggested a bright line distinction between "subsequent punishment" and prior restraint. Indeed, by so stating it clearly implied there was some tangible First Amendment limit as to how far subsequent punishment could go.

Second, the mere fact that a sanction is imposed as part of a *criminal* statutory scheme cannot provide the litmus test separating the permissible from the impermissible sanction. If that were the case, it would be permissible, after a criminal conviction and under an appropriately worded criminal statute, to issue the very injunction stricken in *Near*! Similarly, it would be absurd in the present case to suggest that *Near* would have approved as a permissible "*punishment*" a sanction (*i.e.*, forfeiture) whose "operation and effect" was indistinguishable in any meaningful way from the very sanction *Near* invalidated.

The principles which restrict prior restraints and which control this case were clearly articulated in *Near*, *Keefe* and *Kingsley*, *supra*. As the Court emphasized in *Near* and *Kingsley*, whether a statute imposes an impermissible prior restraint or permissible punishment must be measured by its "operation and effect," and cannot be avoided by a facile characterization of the sanction as "punishment."

If the constitutional guarantee could be evaded simply by a legislative determination that the forfeiture of a business is a "punishment" (a classic example of a "talismanic label"), the entire First Amendment prohibition against prior restraints would be meaningless. Under so toothless a test, nothing would prevent the most outrageous control of the press and other media by government. Nearly every media entity has, at one time or another, committed some speech transgression, *e.g.*, defamation, invasion of privacy, obscenity, a "national security" violation, etc. Certainly, media enterprises are constantly called upon to make their best guesses as to whether particular expression falls within the realm of constitutional protections. It is inevitable that nearly every communications business will make an error of judgment at some time or another.

Yet, if government at any level need only label a sanction as a "criminal punishment" in order to forfeit a speech business for one such "wrong guess," the only media entities which will ultimately survive are those which are approved by government.

As noted above, the asserted distinction between "prior restraint" and "subsequent punishment" is neither meaningful nor useful, because it would permit the imposition of the very sanction condemned in *Near* if authorized by a criminal statute. Instead, the appropriate analysis should focus on whether the particular restraint is one which *directly* suppresses presumptively protected expression.

While many types of governmental sanctions will have the effect of *indirectly* restraining expression, *e.g.*, a jail sentence or a fine, the hallmark of a sanction which is a *direct* and impermissible prior restraint is that it is *imposed for a prior speech violation and in every case where the statutory*

sanction is imposed, it will immediately or inevitably suppress speech. Petitioner submits that this test articulates the common rationale which both explains this Court's previous decisions involving sanctions challenged as prior restraints and also provides the only constitutionally appropriate method for analyzing the endless variety of sanctions that will inevitably arise in the future.

Under this limiting principle, it is clear that RICO forfeiture for prior speech violations must fall whereas typical jail sentences or fines for obscenity violations remain valid. The unlimited forfeiture required by 18 U.S.C. § 1963(a)(1) and (2) will, in every RICO obscenity application, necessarily or immediately suppress presumptively protected expression. Even if one assumed that every single book and videotape in a forfeited store were obscene, the forfeiture of the real and personal property used in or necessary for dissemination of future presumptively protected expression would still, and in every case, suppress the business' ability to engage in future presumptively protected expression.

In contrast, while imposition of a six month jail sentence for an obscenity violation *might* have the effect of shutting down the expressive business, it would likely not have that effect in most cases. In the present case, for example, had Petitioner's only punishment been his six year jail sentence and his \$200,000 fine, his ten businesses would have surely remained open to the public. However, the statutorily mandated forfeiture permanently eliminated the stores. As a result, the public has been deprived of most of the local media outlets for obtaining constitutionally protected erotic materials.

In sum, since RICO forfeiture aims directly at expressive businesses based on prior speech violations and, in every case *directly* compels the suppression of speech itself, and/or the forfeiture of the neutral real and personal property used in or necessary for engaging in presumptively protected speech activities, it must be invalidated as an impermissible prior restraint.

3. **In scores of cases invalidating padlock orders, license revocation, and seizure of the equipment and other property of theatres and bookstores as punishment for obscenity violations, the lower federal and state courts have universally concluded that such remedies operate as unconstitutional prior restraints.**

Notwithstanding the clarity of the prior restraint doctrine, in the early 1970s, state and local governments, in order to eliminate the "inefficiencies" of individual obscenity prosecutions, adopted various novel and equally unconstitutional precursors to RICO forfeiture. They opted to prevent future obscenity violations by simply shutting down the offending media business; they would "punish" obscenity with a padlocking order or by revoking or denying business licenses. With virtual unanimity, an extraordinary number of state and lower federal courts blocked these attempts to close bookstores and theaters as "nuisances" by padlocking or injunction.²⁵

²⁵ The following cases have found nuisance laws unconstitutional which provide for the padlocking of businesses where obscenity offenses have occurred in the past: *Universal Amusement Co., Inc. v. Vance*, 587 F.2d 159, 164-166 (5th Cir. en banc 1978) [as to this particular point, all 14 judges of the en banc court were in agreement], *aff'd.* on other grounds, 445 U.S. 308 (1980); *Pollitt v. Connick*, 596 F.Supp. 261, 269-272 (E.D.La. 1984); *People ex rel. Busch v. Projection Room Theater*, 17 Cal.3d 42, 130 Cal.Rptr. 328, 550 P.2d 600 (1976), *cert. den.* 429 U.S. 922 (1976); *General Corp. v. Sweeton*, 320 So.2d 668 (Ala. 1975), *cert. den.* 425 U.S. 904 (1976); *Kansas v. A Motion Picture Entitled "The Bet"*, 219 Kan. 64, 547 P.2d 760 (1976); *Gulf States Theaters of Louisiana v. Richardson*, 287 So.2d 480 (La. 1974); *New Riveria Arts Theatre v. Davis*, 219 Tenn. 652, 412 S.W.2d 890 (1967); *Society to Oppose Pornography, Inc. v. Thevis*, 255 So.2d 876 (La.App. 1972); *Giarrusso v. D'Iberville Gallery*, 295 So.2d 891 (La.App. 1974); *State ex rel. Blee v. Mohnsey Enterprises*, 289 N.E.2d 519 (Ind.App. 1973); *Sanders v. State*, 231 Ga. 608, 203 S.E.2d 153 (1974); *State ex rel. Field v. Hess*, 540 P.2d 1165 (Okla. 1975); *Commonwealth ex rel. Davis v. Van Emborg*, 347 A.2d 712 (Penn. 1975); *City of Minot v. Central Ave. News, Inc.*, 308 N.W.2d 851 (N.D. 1981); *Parish of Jefferson v. Bayou Landing Ltd., Inc.* 350 So.2d 158 (La. 1977), *overruling*

or, alternatively, by revoking their licenses,²⁶ upon a showing that they sold or exhibited obscenity in the past.

La.App., 341 So.2d 23; *Mitchem v. State ex rel. Schaub*, 250 So.2d 883 (Fla. 1971). See also *Nihiser v. Sendak*, 405 F.Supp. 482, 491-492 (N.D.Ind. 1974), vacated and remanded on other grounds, 423 U.S. 976 (1975), order re-entered August 16, 1976 (unpub.), *aff'd*, 431 U.S. 961 (1977); *Huffman v. Pursue, Ltd.*, 420 U.S. 592, 612, n. 23 (1975); *cf. Speight v. Slaton*, 415 U.S. 333 (1974); *State ex rel. Ewing v. "Without a Stitch"*, 307 N.E.2d 911 (Ohio 1974).

²⁶ In the following cases, courts have held unconstitutional laws which allowed a permit to be revoked or denied because of a prior obscenity violation: *City of Paducah v. Investment Entertainment*, 791 F.2d 463 (6th Cir. 1986); *Gayety Theaters, Inc. v. City of Miami*, 719 F.2d 1550 (11th Cir. 1983); *Entertainment Concepts Inc. III v. Maciejewski*, 631 F.2d 497, 506 (7th Cir. 1980); *Cohen v. City of Daleville, Alabama*, 695 F.Supp. 1168 (M.D.Ala. 1988); *Genusa v. City of Peoria*, 475 F.Supp. 1199, 1207-09 (C.D.Ill. 1979), *aff'd*, 619 F.2d 1203, 1217-1220 (7th Cir. 1980); *Cornflower Entertainment, Inc. v. Salt Lake City Corp.*, 485 F.Supp. 777 (D.Utah 1980); *Bayside Enterprises, Inc. v. Carson*, 470 F.Supp. 1140 (M.D.Fla. 1979); *San Juan Liquors v. Consol. City of Jacksonville*, 480 F.Supp. 151 (M.D.Fla. 1979); *Natco Theatres Inc. v. Ratner*, 463 F.Supp. 1124 (S.D.N.Y. 1979); *Yuclan Enterprises Inc. v. Arre*, 488 F.Supp. 820 (D.Hawaii 1980); *Avon 42nd Street Corp. v. Myerson*, 352 F.Supp. 994 (S.D.N.Y. 1972); *Oregon Bookmark Corp. v. Schrunk*, 321 F.Supp. 639 (D.Oregon 1970); *Perrine v. Municipal Court*, 5 Cal.3d 656, 97 Cal.Rptr. 320, 488 P.2d 648 (1971), cert. den. 404 U.S. 1038 (1972); *Kuhns v. Santa Cruz Co. Bd. of Sup'rs.*, 128 Cal.App.3d 369, 374-375, 181 Cal.Rptr. 1, 3-4 (1982); *City of Seattle v. Bittner*, 81 Wash.2d 747, 505 P.2d 126 (1973); *Alexander v. City of St. Paul*, 303 Minn. 201, 227 N.W.2d 370 (Minn. 1975); *City of Delevan v. Thomas*, 31 Ill.App.3d 630, 334 N.E.2d 190 (1975); *Hamar Theatres Inc. v. City of Newark*, 150 N.J.Super. 14, 374 A.2d 502 (1977); *People v. J.W. Productions*, 413 N.Y.S.2d 552 (N.Y.Cr.Ct. 1979); *State v. Bauer*, 159 Ariz. 443, 768 P.2d 175 (Ariz.App. 1988); see also *Intern. Soc. for Krishna Consciousness v. Eaves*, 601 F.2d 809, 832-833 (5th Cir. 1979); *Fernandes v. Limner*, 663 F.2d 619, 629-630, 632 (5th Cir. 1981); *cf. Marks v. City of Newport Ky.*, 344 F.Supp. 675 (E.D.Ky. 1972); *Chulchian v. City of Indianapolis*, 477 F.Supp. 128, 131-132 (S.D.Ind. 1979), *aff'd*, 633 F.2d 27, 30 (7th Cir. 1980).

The Georgia Supreme Court's opinion in *Sanders v. State*, 231 Ga. 608, 613-614, 203 S.E.2d 153, 157 (1974), typifies the courts' emphatic rejection of these prior restraints:

"The injunction closing the store and padlocking it as a public nuisance necessarily halted the future sale and distribution of other printed material which may not be obscene, thereby . . . creating an unconstitutional restraint upon appellant.

"[T]he overly broad coverage contemplated by this statute . . . creates a chilling effect upon the exercise of free expression. We cannot throw out the protected to rid ourselves of the unprotected as these laws would require. . . . We must use the deft, the precise and the remedial incision of the surgeon rather than the bludgeoning blow of the butcher to cut away cancerous obscenity. If we do not, the body politic will suffer too mortal a blow from our zeal to have a decent society, free of obscene publications but otherwise full of poetry and prose."²⁷

Additionally, in both civil and criminal obscenity cases, the courts have unanimously held that the state may not seize or forfeit personal property (shelves, projectors, etc.) used to disseminate obscene materials.²⁸ In short, innumerable courts

²⁷ This from a court which can hardly be characterized as "soft on obscenity," as, just one year earlier, it had upheld the obscenity conviction of a theater manager for exhibiting the film "Carnal Knowledge" in *State v. Jenkins*, 230 Ga. 726, 199 S.E.2d 183 (1973), unanimously reversed by this Court in *Jenkins v. Georgia*, 418 U.S. 153 (1974).

²⁸ See, e.g., *United States v. Polak*, 312 F.Supp. 112, 116 (E.D.Pa. 1970) (ordering return of defendant's personal property; court ruled that seizure of such instrumentalities was impermissible not only before trial but even after a final determination of obscenity, citing *Near*); *State of Kansas v. A Motion Picture Entitled "The Bet"*, 219 Kan. 64, 547 P.2d 760, 771 (1976) (enjoining enforcement of statute authorizing forfeiture and destruction of movie projectors, theater seats, etc., upon proof of an obscenity violation, on grounds that this was a prior restraint on future presumptively protected expression); *State v. Feld*, 155 Ariz. 88, 745 P.2d 146, 155 (Ariz.App. 1987), cert. denied, 485 U.S. 977 (1988) (RICO

have applied the per se rule of *Near* to invalidate prior restraints considerably less drastic than RICO's outright confiscation of the entire media business including all its protected inventory.

Very recently in *United States v. California Publishers Liquidating Corporation*, 778 F.Supp. 1377 (N.D. Tex. 1991), the district court refused to order the RICO-like obscenity forfeitures the government sought under the discretionary forfeiture provisions of 18 U.S.C. § 1467, and sharply rebuked the government for attempting to invoke such patently unconstitutional remedies:

forfeiture provisions unconstitutional as applied in obscenity case to authorize post-conviction forfeiture of "bookshelves, cash registers, or similar items" used for protected speech activities); *Maguin v. Miller*, 433 F.Supp. 223, 230 (D.Kan. 1977) (enjoining seizure of "property necessary for the operation of theaters," as such seizures would "constitute an impermissible prior restraint"); *Bongiovanni v. Hogan*, 309 F.Supp. 1364, 1366 (S.D.N.Y. 1970) (ordering return of movie projector lenses seized prior to trial); *Interstate Circuit, Inc. v. City of Dallas*, 247 F.Supp. 906, 911 (N.D.Tex. 1965) (enjoining forfeiture of projection equipment, citing *Near*); *G.I. Distributors, Inc. v. Murphy*, 336 F.Supp. 1036, 1038-1039 (S.D.N.Y. 1972) (ordering return of "items required in the conduct of" bookstore, on grounds that seizure "effectively prevented" distribution of other, constitutionally protected materials); *Star Distributors, Ltd. v. Hogan*, 337 F.Supp. 1362, 1364 (S.D.N.Y. 1972) (ordering return of property the seizure of which "worked a complete and total restraint" on publisher's lawful First Amendment activities and "deprived the public of an opportunity to receive its non-obscene publications"); *Porno, Inc. v. Municipal Court*, 33 Cal.App.3d 122, 126, 108 Cal.Rptr. 797, 800 (1973) (ordering return of projectors on prior restraint grounds); *Europa Books, Inc. v. Pomerleau*, 395 A.2d 1195, 1198 (Md. 1979) (enjoining practice of seizing projectors on theory that this was as invalid a prior restraint as "to seize the printing presses because the newspaper contains patently obscene matter"); see also *L.M.E., Inc. v. City of Hollywood*, 605 F.Supp. 185, 189 (S.D.Fla. 1985); *Jodbor Cinema, Ltd. v. Sedita*, 309 F.Supp. 868, 876 (W.D.N.Y. 1970); *Ellwest Streo Theatre, Inc. v. Byrd*, reported sub nom. *Universal Amusement Co., Inc. v. Vance*, 404 F.Supp. 33, 51, 54-57 (S.D.Tex. 1975); *Dexter v. Butler*, 587 F.2d 176 (5th Cir. en banc 1978) (seizure of projectors based on probable obscenity constituted bad faith harassment).

"Forfeiture under these circumstances of truly de minimis use of the properties for the commission of the [obscenity] offenses simply serves no legitimate end; that is, no end other than destroying legal business enterprises simply because their stock in trade is sexually related materials." 778 F.Supp. at 1389.

"[T]he government's requested forfeiture of Great Western's printing facility is subject to close First Amendment analysis and likely would, if granted, constitute an impermissible prior restraint of expression under *Near v. Minnesota* and its progeny." *Id.* at 1394.

In contrast to this avalanche of authority, the very few lower courts which upheld RICO forfeitures or padlockings based on prior obscenity violations did so by concluding that First Amendment analysis does not apply because "obscenity is not protected by the First Amendment." However, for all the reasons the overwhelming majority of lower courts found the principles of *Near* applicable in the obscenity context, they were wrong. The First Amendment simply cannot be avoided by imposing a direct prior restraint as a sanction under a criminal statute and then invoking the talismanic label of "subsequent punishment."

C. The RICO Act's Forfeiture Remedy Also Violates the First Amendment Because It Is Overbroad In Its Censorial Effect Upon Protected Speech.

Just as RICO/obscenity forfeitures facially violate the prior restraint rule of *Near*, they violate virtually every other foundational First Amendment limitation, including the overbreadth doctrine. Both as an overlapping complement and as an alternative to prior restraint analysis, the facial overbreadth doctrine also mandates reversal of the decision below.

This Court has rarely if ever been asked to hold a *sanction* for a speech offense – as opposed to the substantive definition of the speech offense – void for overbreadth. The more common First Amendment overbreadth case involves

legislation which exceeds its permissible scope by criminalizing or otherwise prohibiting constitutionally protected expression. As a doctrinal matter, virtually every overbroad *sanction* which precludes future protected speech has been quickly repudiated on prior restraint grounds, like the injunction in *Near*. The lower courts having so thoroughly repudiated padlocking injunctions and license revocation for obscenity offenses, for example, this Court has never before been confronted with such an egregiously censorial remedy for obscenity as RICO forfeiture.

Until RICO forfeiture became a weapon in the government's aggressive crusade against erotica, the federal government had never dared to punish a speech offense by such drastic and speech-suppressive means as confiscating an entire chain of media businesses and burning its presumptively protected inventory.

This case is therefore somewhat novel, if only because of the extremes to which government has gone. Although RICO/obscenity forfeiture is readily subject to invalidation as a classic prior restraint, it is also overbroad. The forfeiture provisions have been applied, as their mandatory language requires, to confiscate not just contraband obscene materials and proceeds from their sale, but Petitioner's entire chain of bookstores, video stores, and theaters including the hundreds of thousands of media items which comprised their inventory. The government acquires all ownership rights to these materials and related property, so that it can destroy both the materials and the businesses – as indeed the government has done in this case.

As these facts vividly demonstrate, the RICO/obscenity forfeiture provisions provide a textbook example of facial overbreadth. Because the government is authorized to invoke this remedy in response to obscenity violations, in every case, this sanction will be visited upon a defendant engaged in expressive activity, almost

invariably a media entity such as a theater or a bookstore chain.²⁹ The scope of RICO's mandatory forfeiture is such that it necessarily requires, as in this case and *Pryba*, forfeiture of the entire chain of media businesses. Thus the RICO Act targets expression in the first instance, and then allows the government to confiscate inventories of protected expression along with the necessary means for future expression.

As this Court has enunciated the overbreadth doctrine in its prior cases, RICO's provisions for blanket forfeitures³⁰ in obscenity cases represent the sort of overbreadth to which this Court referred in *Members of City Council of the City of Los Angeles v. Taxpayers For Vincent*, 466 U.S. 789, 797-798 (1984), noting that such speech-suppressive statutes may be both unconstitutional as applied to the defendant's conduct and also

"unconstitutional on their face because . . . any attempt to enforce such legislation would create an unacceptable risk of the suppression of ideas. In cases of this character a holding of facial invalidity expresses the conclusion that the statute could never be applied in a valid manner."

Likewise in *Secretary of State of Maryland v. Joseph H. Munson Co., Inc.*, 467 U.S. 947, 967-968 (1984), the Court observed:

²⁹ Depending solely upon the prosecutor's discretion and creativity, the RICO defendants in an obscenity case can easily include as co-conspirators every entity in the chain of production and distribution of the allegedly obscene material, e.g., the studio which produced a film or the printing company which printed a book or magazine. Convictions of such defendants have already occurred in recent prosecutions under the federal obscenity laws. See *United States v. California Publishers Liquidating Corporation*, 778 F.Supp. 1377 (N.D. Tex. 1991) (refusing to forfeit assets of company which printed the boxes for obscene videotapes).

³⁰ As noted previously, this facial invalidity affects only § 1963(a)(1) and (2) of the RICO Act; § 1963(a)(3) is susceptible of a constitutional construction (which the courts below did not give it), limiting forfeiture to the actual obscene items and the proceeds from their sale.

"Where, as here, a statute imposes a direct restriction on protected First Amendment activity, and where the defect in the statute is that the means chosen to accomplish the State's objectives are too imprecise, so that in all its applications the statute creates an unnecessary risk of chilling free speech, the statute is properly subject to facial attack."

Similarly, just last term in *R.A.V. v. City of St. Paul*, 112 S.Ct. at 2542 n. 3, Justice Scalia noted that the petitioner had properly challenged the ordinance as "'overbroad' in the sense of restricting more speech than the Constitution permits, even in its application to him."

In virtually every imaginable application in the obscenity context, RICO forfeiture clearly "imposes a direct restriction on protected First Amendment activity," a restriction so broad that "any attempt to enforce such legislation would create an unacceptable risk of the suppression of ideas."

Perhaps most directly analogous is *NAACP v. Alabama*, 377 U.S. 288 (1964), in which this Court invalidated for overbreadth a sanction unduly restricting the prospective exercise of First Amendment rights, *even though the triggering conduct (involving both speech and non-speech activities) was unprotected*. In that case, Alabama had obtained an injunction against the NAACP, prohibiting it from conducting its activities within the state on various asserted grounds, including the organization's failure to comply with state laws requiring foreign corporations to register, and its allegedly illegal sponsorship of consumer boycotts. 377 U.S. at 303, 307. This Court held that even if the NAACP's activities did violate valid state laws, the injunction permanently "denying its members the right to associate" in the state was unconstitutionally overbroad. *Id.* at 306, 307-308.

"This Court has repeatedly held that a governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms. . . . '[T]he power to regulate must be so exercised as not, in attaining a permissible end,

unduly to infringe the protected freedom.' *Cantwell v. Connecticut*, 310 U.S. 296, 304. 'Even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved.' *Shelton v. Tucker*, 364 U.S. 479, 488." *Id.* at 307-308.

More recently, Justice O'Connor's opinion for the Court in *Airport Commissioners of Los Angeles v. Jews for Jesus*, 482 U.S. 569 (1987), reaffirmed that facial invalidation is the appropriate remedy for such substantially overbroad laws. In *Jews for Jesus*, this Court held that a resolution banning all First Amendment activities in the LAX terminal area was facially unconstitutional for overbreadth. The Court unanimously concluded that regardless of whether the airport terminal was a public or a non-public forum, the resolution was overbroad "because no conceivable governmental interest would justify such an absolute prohibition of speech." 482 U.S. at 575.

Likewise, in this case, no further First Amendment analysis is necessary, because no conceivable governmental interest can justify its confiscation of media businesses in retaliation for unprotected speech.³¹ Because *every* use of the statute to seize presumptively protected inventory and all the other speech-facilitating property of a communicative business is overbroad, facial invalidation is the required remedy. As the district court observed in *United States v. California Publishers Liquidating Corporation*, 778 F.Supp. at 1394, wholesale forfeiture for obscenity offenses "simply serves no legitimate end."³²

³¹ To be sure, this rule is but another way of stating the *Near* rule against prior restraints; overbreadth analysis of a sanction for speech violations simply yields the same result.

³² Although the Ninth Circuit in *Adult Video Association v. Barr*, 960 F.2d 781 (9th Cir. 1992), ostensibly rejected the plaintiffs' claim that RICO/obscenity forfeitures are facially overbroad, 960 F.2d at 787, just such an inchoate theory of overbreadth actually appears to be the basis for

II. THE TOTAL FORFEITURE OF A \$25 MILLION BUSINESS, IN ADDITION TO A SIX-YEAR PRISON TERM AND \$200,000 IN FINES, VIOLATES THE EIGHTH AMENDMENT AS A GROSSLY DISPROPORTIONATE PUNISHMENT FOR DISTRIBUTING SEVEN OBSCENE ITEMS.

Ferris Alexander has received the most severe economic sanction ever imposed in this country for obscenity offenses. Merely for distributing seven erotic magazines and videotapes he believed at the time to be constitutionally protected, the ailing 73-year-old Petitioner has been sentenced to serve six years in prison – a probable life sentence – and has been fined some \$200,000. In addition, the government has also confiscated virtually everything he owns: the business he had built up over a thirty-year period of operating his bookstore, theater, and video store chain. On the basis of a few materials the jury ultimately decided were obscene, the government has utterly destroyed the Petitioner's life and livelihood. Whether analyzed as a "cruel and unusual punishment" or as an "excessive fine,"³³ RICO forfeiture as applied in this case is grossly disproportionate to the offense and therefore violates the Eighth Amendment. Moreover, on its face RICO revives a form of *in personam* forfeiture closely akin to the much-

the court's holding that "to the extent section 1963 mandates forfeiture of more property than the Constitution will tolerate as punishment for an obscenity offense, the statute is unconstitutional on its face." *Id.* at 790. Unfortunately, RICO prescribes mandatory, total forfeitures upon conviction of two obscenity offenses, and contrary to the Ninth Circuit's suggestion is susceptible of no reasonable saving construction; it is simply unconstitutional on its face.

³³ For Eighth Amendment purposes, as noted below, RICO forfeitures are tantamount to fines, because they entail essentially the same sort of pecuniary punishment for a crime, distinguished only by the non-liquidity of certain assets. This is not to say that the forfeitures and monetary fines are equivalents for purposes of First Amendment analysis, because forfeitures unlike fines impose a direct and inevitable restraint upon protected expression.

abused forfeiture of estate which the Framers clearly sought to abolish under the Eighth Amendment.

The Eighth Amendment prohibits outrageous or barbaric forms of punishment, "excessive fines," and punishments that are "cruel and unusual" because they are extremely disproportionate to the particular offense. In *Harmelin v. Michigan*, ___ U.S. ___, 111 S.Ct. 2680 (1991), seven members of this Court endorsed the holding of *Solem v. Helm*, 463 U.S. 277, 284 (1983), that the Eighth Amendment "prohibits not only barbaric punishments, but also sentences that are disproportionate to the crime committed."³⁴ This majority of the Court concluded that the Eighth Amendment at least forbids "extreme sentences that are 'grossly disproportionate' to the crime." 111 S.Ct. at 2705. Although a majority in *Harmelin* agreed that reviewing courts should grant the trial court and the legislature substantial deference, "no penalty is *per se* constitutional," as the Court noted in *Solem*, 463 U.S. at 290, citing *Robinson v. California*, 370 U.S. 660 (1962). See 111 S.Ct. at 2704-2705 (Kennedy, J., concurring).

If divided in *Harmelin* as to the meaning of "cruel and unusual punishment," the Court was apparently unanimous in the view that an "excessive fines" claim requires proportionality review. Justice Scalia, in his opinion for the Court joined by Chief Justice Rehnquist, concluded that the cruel and unusual punishment clause requires proportionality review only in capital cases, but apparently agreed with the dissenters' observation that the Eighth Amendment prohibits disproportionate fines:

"There is good reason to be concerned that fines, uniquely of all punishments, will be imposed in a measure out of accord with the penal goals of retribution and deterrence. Imprisonment, corporal punishment and even capital punishment cost a State money; fines are a source of revenue. As we have

³⁴ See 111 S.Ct. at 2702-2709 (Kennedy, J., joined by O'Connor and Souter, JJ., concurring in part and concurring in the judgment); 111 S.Ct. at 2709-2719 (White, J., joined by Blackmun and Stevens, JJ., dissenting); 111 S.Ct. at 2719 (Marshall, J., dissenting).

recognized in the context of other constitutional provisions, it makes sense to scrutinize governmental action more closely when the State stands to benefit."

111 S.Ct. at 2693 n. 9. Although this Court "has never considered an application of the Excessive Fines Clause," *Browning-Ferris Industries of Vermont v. Kelco Disposal, Inc.*, 492 U.S. 257, 262 (1989), Justice Scalia indicated in *Harmelin* that penalties such as forfeitures which entail a built-in incentive for governmental abuse³⁵ are tantamount to fines for Eighth Amendment purposes: "We relied upon precisely the lack of this incentive for abuse in holding that 'punitive damages' were not 'fines' within the meaning of the Eighth Amendment," in *Browning-Ferris*. 111 S.Ct. at 2693 n. 9. Indeed, Justice O'Connor specifically noted in *Browning-Ferris* that "[i]n current usage, the word 'fine' comprehends a forfeiture." 492 U.S. at 297 (concurring and dissenting opinion).

Thus a majority if not the unanimous Court in *Harmelin* would have agreed that the Eighth Amendment entails a guarantee of proportionality in cases involving blanket RICO forfeiture, either as a "cruel and unusual punishment," or as an "excessive fine." This Court need not resort to proportionality analysis, however, to reject RICO's mandatory total

³⁵ Blanket forfeitures of the RICO variety certainly offer a tempting means for the government to fill its coffers. After RICO's forfeiture provisions were strengthened in 1984, "forfeiture cases doubled each year and the number of seizures grew by approximately 125 percent per year." The past few years have witnessed an increasing governmental appetite for these funds: "In dollar terms, total forfeitures went from \$27.2 million in fiscal year 1985 to over \$580 million in fiscal year 1989." *Concerning Oversight of the Asset Forfeiture Program*, July 24, 1990: Before the Senate Committee on Governmental Affairs, 101st Cong., 2d Sess. 71, 72 (statement by Cary H. Copeland, Director, Executive Office for Asset Forfeiture), quoted in Craig W. Palm, *RICO Forfeiture and the Eighth Amendment: When Is Everything Too Much?*, 53 U. Pitt. L. Rev. 1, 4 (1991).

forfeitures as a form of punishment outlawed by the Eighth Amendment on historical grounds.

At its core, the Eighth Amendment forbids punishments that by their very nature the Framers would have disapproved as barbarous or prone to prosecutorial abuse, or that have come to be viewed as such in accord with our society's evolving standards. RICO forfeiture is not only grossly disproportionate in this particular case; it facially contravenes the Eighth Amendment because it revives the *in personam* forfeiture, a particularly objectionable, abuse-prone form of punishment which the Framers particularly sought to abolish.

There is compelling historical and textual evidence that the Framers firmly intended to abolish the forfeiture of estate of which RICO forfeiture is the modern version. Before Magna Carta, conviction of a felony resulted in automatic forfeiture of all property. William W. Taylor III, *The Problem of Proportionality in RICO Forfeitures*, 65 Notre Dame L. Rev. 885, 893 (1990). These "forfeitures of estate" had been eliminated from English common law for any offense other than treason by the time of the Constitutional Convention; the American Framers went further and prohibited forfeiture of estate in the case of treason, under Art. III, sec. 3, clause 2. *Id.* Also, the First Congress by its Act of April 30, 1790 provided "That no conviction or judgment for any of the offenses aforesaid, shall work corruption of blood, or any forfeiture of estate."³⁶ Since then, *in personam* forfeitures have been so disfavored under American law that until RICO was enacted in 1970, there had been no known federal *in personam* forfeiture proceedings since the Civil War.³⁷ Thus "the fact that our society long ago rejected forfeiture of a defendant's goods and chattels upon . . . conviction . . . establishes that our society views forfeiture as

³⁶ Act of April 30, 1790, ch. 9, § 24, 1 Stat. 112, 117 (1790) (codified at 18 U.S.C. § 3563 (1982)).

³⁷ See James R. Maxeiner, *Bane of American Forfeiture Law - Banished At Last?*, 62 Cornell L. Rev. 768, 787 (1977).

cruel and unusual punishment unless the property is the proceeds of crime or related to crime in some clearly demonstrable way." Taylor, *supra*, at 893.

Quite apart from the historical evidence that this sort of punishment facially violates the Eighth Amendment, the blanket forfeiture of a multi-million dollar business for a few obscenity offenses is grossly disproportionate by any standard. As punishment for an offense historically classified as a misdemeanor in most jurisdictions where it is a crime at all,³⁸ the mandatory forfeiture order in this case is as inappropriate as the punishment this Court disapproved in *Robinson v. California*, under a statute making addiction to narcotics a criminal offense. The 90-day jail term imposed for this status offense was "cruel and unusual" even though the jail time was

"not, in the abstract, a punishment which is either cruel or unusual. But the question cannot be considered in the abstract. Even one day in prison would be a cruel and unusual punishment for the 'crime' of having a common cold." 370 U.S. at 667.

In *Solem v. Helm*, 463 U.S. at 292, the Court noted that in assessing the gravity of the offense, the primary criteria are the harm suffered by the victim and the defendant's culpability. This multi-million dollar forfeiture of Petitioner's assets is especially disproportionate when viewed in light of these criteria, given that the offense involves no legal element of injury and requires negligible proof of scienter. Unlike many of the predicate crimes for RICO, obscenity is a minor, *malum prohibitum* offense. Unfortunately, however, RICO

"does not limit itself to 'serious criminality,' and its penalties do not adjust qualitatively to the moral blameworthiness of the conduct. The number and variety of predicate offenses, which can include *malum prohibitum* as well as *malum in se*, might suggest that the statute should provide some internal way for modulating its sanctions, but the statute provides no such method." Taylor, *supra*, at 887.

³⁸ See n. 39, *infra*.

First, in terms of the gravity of the offense, this Court has never discerned a compelling governmental interest to justify laws criminalizing obscenity, but has relied on the concept of obscenity as a proscribable (if difficult-to-define) category of speech which may be prohibited on the basis of "legitimate" interests. See *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 57 (1973). In *Osborne v. Ohio*, 495 U.S. 103, 109-110 (1990), this Court reiterated, as it had concluded in *Stanley v. Georgia*, 394 U.S. 557 (1969), that the governmental interests in regulating adults' access to "obscene" materials are "weak" and "paternalistic." The Court again noted in *Osborne* that "[w]e found a lack of empirical evidence" to support the state's claim in *Stanley* that "exposure to obscene material might lead to deviant sexual behavior or crimes of sexual violence." 495 U.S. at 109 n. 4.

Additionally, both the legal definition of the obscenity offense and its social context render obscenity a victimless and relatively nonserious crime. The offense requires proof of nothing more than offering erotica for sale or rental to consenting adults; this case typifies recent federal obscenity prosecutions in that it involves neither minors nor an unconsenting adult audience. Moreover, the obscenity predicate is unique among the RICO offenses in that it requires virtually no *mens rea*: the scienter element for obscenity approaches a strict liability standard, requiring only knowledge of the material's sexual content rather than knowledge of its unpredictable legal status as obscenity. Even more so than the crime of issuing a worthless check in *Solem v. Helm*, obscenity is thus "'one of the most passive felonies a person could commit,' " involving "'neither violence nor threat of violence to any person,' " and "'viewed by society as among the less serious offenses.' " 463 U.S. at 296, quoted in *Harmelin v. Michigan*, 111 S.Ct. at 2705 (Kennedy, J., concurring).

Underscoring the nonseriousness of the obscenity offense is the fact that the conduct for which Petitioner was convicted

under RICO is not even criminalized in many states.³⁹ The immense popularity of indistinguishable videotapes and magazines further attests to the American adult populace's substantial acceptance of sexually-explicit fare, and thus the lack of seriousness of the offense.⁴⁰

Even without the additional First Amendment concerns this case raises, the federal courts have expressed serious reservations about the inherent proportionality problems RICO's mandatory total forfeiture provisions create.⁴¹ In

³⁹ Five states – Alaska, Maine, New Mexico, South Dakota, and Vermont – do not have obscenity statutes. In addition, the supreme courts of both Oregon and Hawaii have held that criminal obscenity statutes inherently violate those states' constitutional guarantees of free speech or privacy. See *State v. Kam*, 748 P.2d 372 (Hawaii 1988); *State v. Henry*, 302 Or. 510, 732 P.2d 9 (Or. 1987). The issue is also currently pending before the Arizona Court of Appeals, in *State v. Smith*, Case No. 1 CA-CR 89-1514; the trial court in that case having held that the Arizona obscenity statute violated both the free speech and privacy provisions of the Arizona Constitution.

⁴⁰ As noted above with regard to the RICO Act's chilling effect, the immense popularity of adult videotapes indicates widespread acceptance of materials which could also be the subject of an obscenity prosecution. The marketing statistics reveal approximately 400 million rentals of adult videos per year. In 1989, video dealers reported that 47% of adult video rentals were to couples or women alone. See Marcia Pally, *Sense and Censorship: The Vanity of Bonfires* 67 (Freedom to Read Foundation 1991).

⁴¹ Commentators have discussed the troublesome proportionality problems posed by RICO forfeitures in a wealth of law review literature, generally concluding that the RICO Act should be amended either to limit forfeitures to the actual proceeds of illegality, or to give the trial court discretion as to the scope and amount of the forfeiture. See William W. Taylor, *The Problem of Proportionality in RICO Forfeitures*, 65 N.D.L. Rev. 885 (1990); Ian A. J. Pitz, *Letting the Punishment Fit the Crime: Proportional Forfeiture Under Criminal RICO's Source of Influence Provision*, 75 Minn. L. Rev. 1223 (1991); Vernon M. Winters, *Criminal RICO Forfeitures and the Eighth Amendment: "Rough" Justice Is Not Enough*, 14 Hast. Const. L.Q. 451 (1987); Kathleen F. Brickey, *RICO Forfeitures As "Excessive Fines" Or "Cruel and Unusual Punishments"*, 35 Vill. L. Rev.

United States v. Busher, 817 F.2d 1409, 1415 (9th Cir. 1987), Judge Kozinski for a unanimous panel held that where the defendant makes a prima facie showing that a forfeiture may be excessive, the trial court must make an Eighth Amendment proportionality inquiry, considering the total penalty imposed in light of the gravity of the offense.⁴² "Since RICO's forfeiture provision is quite literally without limitation," the court emphasized, "it may well exceed constitutional bounds in any particular case." 817 F.2d at 1414. "The court should be reluctant to order forfeiture of a defendant's entire interest in an enterprise that is essentially legitimate where he has committed relatively minor RICO violations . . . resulting in relatively little illegal gain in proportion to its size and legitimate income." *Id.* at 1415-1416.

Subsequently, in *Adult Video Association v. Barr*, 960 F.2d 781 (9th Cir. 1992), the Ninth Circuit relied in part on *Busher* in resolving this very issue: whether blanket forfeitures may be imposed in obscenity cases. Rejecting blanket forfeitures for RICO/obscenity primarily on First Amendment grounds, the court also cited *Busher* repeatedly for the proposition that total forfeiture would be an inappropriate remedy for obscenity offenses in all but the most exceptional circumstances. 960 F.2d at 790-791.

As the *Adult Video Association* court concluded, punishing this victimless offense as severely as murder for hire is entirely incongruous and at odds with the Eighth Amendment.

905 (1990); John L. Roberts, *The Eighth Amendment As Applied To RICO Criminal Forfeiture*, 10 W.N. Eng. L. Rev. 393 (1988); Craig W. Palm, *RICO Forfeiture and the Eighth Amendment: When Is Everything Too Much?*, 53 U. Pitt. L. Rev. 1 (1991).

⁴² *Busher* has become a cornerstone case applying *Solem v. Helm* proportionality analysis to criminal forfeitures. Three other circuits have adopted or cited with approval this Ninth Circuit rule that forfeitures must be examined for disproportionality under the Eighth Amendment. See *United States v. Harris*, 903 F.2d 770, 777-778 (10th Cir. 1990); *United States v. Vriener*, 921 F.2d 710, 711-712 (7th Cir. 1991); *United States v. Angiulo*, 897 F.2d 1169, 1211-1212 (1st Cir. 1990). See also *United States v. Robinson*, 721 F.Supp. 1541, 1543 (D.R.I. 1989).

In refusing to apply proportionality analysis or otherwise review this unprecedented punishment for obscenity under the Eighth Amendment,⁴³ the court below has eviscerated that constitutional protection. Ostensibly deferring to the trial court's discretion, the court of appeals ignored the fact that under § 1963(a), the district court *had no* discretion to limit the RICO forfeiture. Its deference to Congress, which added obscenity to the list of RICO predicate offenses in haste and without considering the anomaly and constitutional problems involved, is misplaced.

Ferris Alexander operated his businesses for some thirty years, in the course of which he distributed millions of media materials protected by the First Amendment. He has been abundantly punished by a six-year prison term and \$200,000 in fines, for failing to anticipate that a jury would find seven of the thirteen charged items to be illegal rather than constitutionally protected. The total forfeiture of his multi-million dollar business goes far beyond any legitimate need for deterrence or societal retribution for this minor offense. It is egregiously disproportionate, facially suspect as an *in personam* forfeiture, and should be rejected as a constitutionally inappropriate remedy.

- * * *

The catastrophic forfeiture imposed on Petitioner represents perhaps the most egregious governmental suppression of expression in our nation's history. Solely on the basis of seven *speech* violations, the government has utterly destroyed a twenty-five million dollar media business under the talismanic labels of "racketeering" and "subsequent punishment."

If this Court should endorse this unprecedented takeover of a speech business, it will not only signal the immediate end

⁴³ The Eighth Circuit in its opinion below followed the erroneous holding in *United States v. Pryba*, 900 F.2d at 757, that "*Solem v. Helm* does not require a proportionality review of any sentence less than life imprisonment without the possibility of parole." See Cert. App. 25.

of the erotic entertainment industry, but, more importantly, will confer upon government new-found power and weapons with which to insure that only newspapers, broadcasters and other media businesses approved by any current administration, will be permitted to exist. As stated by Chief Justice Hughes in *Near*, this "is the essence of censorship."

CONCLUSION

The forfeiture judgments entered against Petitioner, except as they specifically relate to the seven items found obscene at trial and identifiable proceeds from the sale of those materials, constitute invalid direct prior restraints, are overbroad and represent cruel and unusual punishment. They and the portions of the RICO statute which made them mandatory should be stricken and the judgment of the Court of Appeals for the Eighth Circuit affirming them should be reversed.

Dated: September 4, 1992

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APPENDIX

18 U.S.C. § 1963. Criminal penalties

(a) Whoever violates any provision of section 1962 of this chapter shall be fined under this title or imprisoned not more than 20 years (or for life if the violation is based on a racketeering activity for which the maximum penalty includes life imprisonment), or both, and shall forfeit to the United States, irrespective of any provision of State law—

(1) any interest the person has acquired or maintained in violation of section 1962;

(2) any—

(A) interest in;

(B) security of;

(C) claim against; or

(D) property or contractual right of any kind affording a source of influence over;

any enterprise which the person has established, operated, controlled, conducted, or participated in the conduct of in violation of section 1962; and

(3) any property constituting, or derived from, any proceeds which the person obtained, directly or indirectly, from racketeering activity or unlawful debt collection in violation of section 1962.

The court, in imposing sentence on such person shall order, in addition to any other sentence imposed pursuant to this section, that the person forfeit to the United States all property described in this subsection. In lieu of a fine otherwise authorized by this section, a defendant who derives profits or other proceeds from an offense may be fined not more than twice the gross profits or other proceeds.

(b) Property subject to criminal forfeiture under this section includes—

(1) real property, including things growing on, affixed to, and found in land; and

(2) tangible and intangible personal property, including rights, privileges, interests, claims and securities.

(c) All right, title, and interest in property described in subsection (a) vests in the United States upon the commission of the act giving rise to forfeiture under this section. Any such property that is subsequently transferred to a person other than the defendant may be the subject of a special verdict of forfeiture and thereafter shall be ordered forfeited to the United States, unless the transferee establishes in a hearing pursuant to subsection (1) that he is a bona fide purchaser for value of such property who at the time of purchase was reasonably without cause to believe that the property was subject to forfeiture under this section.

(d)(1) Upon application of the United States, the court may enter a restraining order or injunction, require the execution of a satisfactory performance bond, or take any other action to preserve the availability of property described in subsection (a) for forfeiture under this section—

(A) upon the filing of an indictment or information charging a violation of section 1962 of this chapter and alleging that the property with respect to which the order is sought would, in the event of conviction, be subject to forfeiture under this section; or

(B) prior to the filing of such an indictment or information, if, after notice to persons appearing to have an interest in the property and opportunity for a hearing, the court determines that—

(i) there is a substantial probability that the United States will prevail on the issue of forfeiture and that failure to enter the order will result in the property being destroyed, removed from the jurisdiction of the court, or otherwise made unavailable for forfeiture; and

(ii) the need to preserve the availability of the property through the entry of the

requested order outweighs the hardship on any party against whom the order is to be entered:

Provided, however, That an order entered pursuant to subparagraph (B) shall be effective for not more than ninety days, unless extended by the court for good cause shown or unless an indictment or information described in subparagraph (A) has been filed.

(2) A temporary restraining order under this subsection may be entered upon application of the United States without notice or opportunity for a hearing when an information or indictment has not yet been filed with respect to the property, if the United States demonstrates that there is probable cause to believe that the property with respect to which the order is sought would, in the event of conviction, be subject to forfeiture under this section and that provision of notice will jeopardize the availability of the property for forfeiture. Such a temporary order shall expire not more than ten days after the date on which it is entered, unless extended for good cause shown or unless the party against whom it is entered consents to an extension for a longer period. A hearing requested concerning an order entered under this paragraph shall be held at the earliest possible time, and prior to the expiration of the temporary order.

(3) The court may receive and consider, at a hearing held pursuant to this subsection, evidence and information that would be inadmissible under the Federal Rules of Evidence.

(e) Upon conviction of a person under this section, the court shall enter a judgment of forfeiture of the property to the United States and shall also authorize the Attorney General to seize all property ordered forfeited upon such terms and conditions as the court shall deem proper. Following the entry of an order declaring the property forfeited, the court may, upon application of the United States, enter such appropriate restraining orders or injunctions, require the execution of satisfactory performance bonds, appoint receivers, conservators, appraisers, accountants, or trustees, or take any other

action to protect the interest of the United States in the property ordered forfeited. Any income accruing to, or derived from, an enterprise or an interest in an enterprise which has been ordered forfeited under this section may be used to offset ordinary and necessary expenses to the enterprise which are required by law, or which are necessary to protect the interests of the United States or third parties.

(f) Following the seizure of property ordered forfeited under this section, the Attorney General shall direct the disposition of the property by sale or any other commercially feasible means, making due provision for the rights of any innocent persons. Any property right or interest not exercisable by, or transferable for value to, the United States shall expire and shall not revert to the defendant, nor shall the defendant or any person acting in concert with or on behalf of the defendant be eligible to purchase forfeited property at any sale held by the United States. Upon application of a person, other than the defendant or a person acting in concert with or on behalf of the defendant, the court may restrain or stay the sale or disposition of the property pending the conclusion of any appeal of the criminal case giving rise to the forfeiture, if the applicant demonstrates that proceeding with the sale or disposition of the property will result in irreparable injury, harm or loss to him. Notwithstanding 31 U.S.C. 3302(b), the proceeds of any sale or other disposition of property forfeited under this section and any moneys forfeited shall be used to pay all proper expenses for the forfeiture and the sale, including expenses of seizure, maintenance and custody of the property pending its disposition, advertising and court costs. The Attorney General shall deposit in the Treasury any amounts of such proceeds or moneys remaining after the payment of such expenses.

(g) With respect to property ordered forfeited under this section, the Attorney General is authorized to—

- (1) grant petitions for mitigation or remission of forfeiture, restore forfeited property to victims of a violation of this chapter, or take any other action

to protect the rights of innocent persons which is in the interest of justice and which is not inconsistent with the provisions of this chapter;

- (2) compromise claims arising under this section;

- (3) award compensation to persons providing information resulting in a forfeiture under this section;

- (4) direct the disposition by the United States of all property ordered forfeited under this section by public sale or any other commercially feasible means, making due provision for the rights of innocent persons; and

- (5) take appropriate measures necessary to safeguard and maintain property ordered forfeited under this section pending its disposition.

(h) The Attorney General may promulgate regulations with respect to—

- (1) making reasonable efforts to provide notice to persons who may have an interest in property ordered forfeited under this section;

- (2) granting petitions for remission or mitigation of forfeiture;

- (3) the restitution of property to victims of an offense petitioning for remission or mitigation of forfeiture under this chapter;

- (4) the disposition by the United States of forfeited property by public sale or other commercially feasible means;

- (5) the maintenance and safekeeping of any property forfeited under this section pending its disposition; and

- (6) the compromise of claims arising under this chapter.

Pending the promulgation of such regulations, all provisions of law relating to the disposition of property, or the proceeds

from the sale thereof, or the remission or mitigation of forfeitures for violation of the customs laws, and the compromise of claims and the award of compensation to informers in respect of such forfeitures shall apply to forfeitures incurred, or alleged to have been incurred, under the provisions of this section, insofar as applicable and not inconsistent with the provisions hereof. Such duties as are imposed upon the Customs Service or any person with respect to the disposition of property under the customs law shall be performed under this chapter by the Attorney General.

(i) Except as provided in subsection (l), no party claiming an interest in property subject to forfeiture under this section may—

(1) intervene in a trial or appeal of a criminal case involving the forfeiture of such property under this section; or

(2) commence an action at law or equity against the United States concerning the validity of his alleged interest in the property subsequent to the filing of an indictment or information alleging that the property is subject to forfeiture under this section.

(j) The district courts of the United States shall have jurisdiction to enter orders as provided in this section without regard to the location of any property which may be subject to forfeiture under this section or which has been ordered forfeited under this section.

(k) In order to facilitate the identification or location of property declared forfeited and to facilitate the disposition of petitions for remission or mitigation of forfeiture, after the entry of an order declaring property forfeited to the United States the court may, upon application of the United States, order that the testimony of any witness relating to the property forfeited be taken by deposition and that any designated book, paper, document, record, recording, or other material not privileged be produced at the same time and place, in the

same manner as provided for the taking of depositions under Rule 15 of the Federal Rules of Criminal Procedure.

(l)(1) Following the entry of an order of forfeiture under this section, the United States shall publish notice of the order and of its intent to dispose of the property in such manner as the Attorney General may direct. The Government may also, to the extent practicable, provide direct written notice to any person known to have alleged an interest in the property that is the subject of the order of forfeiture as a substitute for published notice as to those persons so notified.

(2) Any person, other than the defendant, asserting a legal interest in property which has been ordered forfeited to the United States pursuant to this section may, within thirty days of the final publication of notice or his receipt of notice under paragraph (1), whichever is earlier, petition the court for a hearing to adjudicate the validity of his alleged interest in the property. The hearing shall be held before the court alone, without a jury.

(3) The petition shall be signed by the petitioner under penalty of perjury and shall set forth the nature and extent of the petitioner's right, title, or interest in the property, the time and circumstances of the petitioner's acquisition of the right, title, or interest in the property, any additional facts supporting the petitioner's claim, and the relief sought.

(4) The hearing on the petition shall, to the extent practicable and consistent with the interests of justice, be held within thirty days of the filing of the petition. The court may consolidate the hearing on the petition with a hearing on any other petition filed by a person other than the defendant under this subsection.

(5) At the hearing, the petitioner may testify and present evidence and witnesses on his own behalf, and cross-examine witnesses who appear at the hearing. The United States may present evidence and witnesses in rebuttal and in defense of its claim to the property and cross-examine witnesses who appear at the hearing. In addition to testimony and

evidence presented at the hearing, the court shall consider the relevant portions of the record of the criminal case which resulted in the order of forfeiture.

(6) If, after the hearing, the court determines that the petitioner has established by a preponderance of the evidence that—

(A) the petitioner has a legal right, title, or interest in the property, and such right, title, or interest renders the order of forfeiture invalid in whole or in part because the right, title, or interest was vested in the petitioner rather than the defendant or was superior to any right, title, or interest of the defendant at the time of the commission of the acts which gave rise to the forfeiture of the property under this section; or

(B) the petitioner is a bona fide purchaser for value of the right, title, or interest in the property and was at the time of purchase reasonably without cause to believe that the property was subject to forfeiture under this section;

the court shall amend the order of forfeiture in accordance with its determination.

(7) Following the court's disposition of all petitions filed under this subsection, or if no such petitions are filed following the expiration of the period provided in paragraph (2) for the filing of such petitions, the United States shall have clear title to property that is the subject of the order of forfeiture and may warrant good title to any subsequent purchaser or transferee.

(m) If any of the property described in subsection (a), as a result of any act or omission of the defendant—

(1) cannot be located upon the exercise of due diligence;

(2) has been transferred or sold to, or deposited with, a third party;

(3) has been placed beyond the jurisdiction of the court;

(4) has been substantially diminished in value; or

(5) has been commingled with other property which cannot be divided without difficulty;

the court shall order the forfeiture of any other property of the defendant up to the value of any property described in paragraphs (1) through (5).

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No. 91-1526

OCT 29 1992

CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1992

FERRIS J. ALEXANDER, SR., PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTIONS PRESENTED

1. Whether the post-trial forfeiture provisions of RICO violate the First Amendment when the predicate acts of racketeering are obscenity violations and the forfeited property consists of the assets of a business dealing in expressive materials.

2. Whether the forfeiture of petitioner's property resulting from his RICO convictions was disproportionate to his crimes, in violation of the Eighth Amendment.

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OPINION BELOW

The opinion of the court of appeals, Pet. App. 1-26, is reported at 943 F.2d 825.

JURISDICTION

The judgment of the court of appeals was entered on August 30, 1991. A petition for rehearing was denied on October 30, 1991. On February 19, 1992, Justice Blackmun extended the time for filing a petition for a writ of certiorari to March 16, 1992. The petition was filed on that date and was granted on June 29, 1992. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant constitutional and statutory provisions are reprinted in an appendix to this brief. App., *infra*, 1a-2a.

STATEMENT

After a four-month jury trial in the United States District Court for the District of Minnesota, petitioner was convicted on one count of conspiring to defraud the United States by impeding the lawful functions of the Internal Revenue Service (IRS), in violation of 18 U.S.C. 371; two counts of filing false income tax returns, in violation of 26 U.S.C. 7206(1); one count of receiving and using income derived from a pattern of racketeering activity, in violation of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. 1962(a); one count of conducting a RICO enterprise, in violation of 18 U.S.C. 1962(c); one count of conspiring to commit that offense, in violation of 18 U.S.C. 1962(d); 12 counts of transporting obscene material in interstate commerce for the purpose of sale or distribution, in violation of 18 U.S.C. 1465; five counts of engaging in the business of selling obscene material, in violation of 18 U.S.C. 1466; and one count of falsely representing a social security number for the purpose of impeding the IRS, in violation of 42 U.S.C. 408(g)(2). Pet. App. 1-2 & n.1, 127.¹

¹Petitioner was convicted in 1970 of conspiring to distribute large quantities of obscene material. See *United States v. Manarite*, 448 F.2d 583 (2d Cir.), cert. denied, 404 U.S. 947 (1971); *United States v. Alexander*, 498 F.2d 934 (2d Cir. 1974). For that reason, contrary to petitioner's suggestion, Pet. Br. 2-3 n.1, it could not have been a surprise to him that he could be prosecuted under the federal obscenity laws.

Petitioner was sentenced to a total of six years' imprisonment, fined \$100,000, and ordered to pay the costs of the prosecution, his incarceration, and his supervised release. In addition, the district court ordered forfeiture of ten of petitioner's commercial real estate properties, as well as the assets of his wholesale business and retail book and video stores, which included the bank accounts, furniture, fixtures, and inventory of those businesses. The court also ordered petitioner to forfeit \$8,910,548.10, which constituted the proceeds of his racketeering activity over a four-year period. Pet. App. 127-145. The court of appeals affirmed.

1. For some 30 years, petitioner was engaged in the so-called "adult entertainment" business, selling magazines and sexual paraphernalia, showing films, and selling and renting video cassettes. Petitioner plied his trade in retail stores, rental stores, and movie theaters located throughout Minnesota. The sale and rental of the sexually explicit materials generated millions of dollars in annual revenues. Pet. App. 3, 9.

Petitioner used elaborate means to conceal his wealth. He established sham corporations and used false names and the names of employees in opening bank accounts, obtaining licenses, and responding to state and federal reporting requirements. He also filed false tax returns in 1982 and 1983 that under-reported his gross receipts by approximately \$2.7 million. Pet. App. 3-7, 25; J.A. 25-88; Gov't C.A. Br. 1.

At the time of his arrest, petitioner's adult entertainment empire included 13 retail stores and a warehouse. Petitioner received shipments of pornographic materials at the warehouse, where the materials were then wrapped in plastic, priced, boxed, and distrib-

uted to his retail outlets. Petitioner testified that he was the sole owner of the 13 retail stores and the wholesale business.² The revenue generated by the stores was brought to petitioner at the warehouse and main office. Petitioner placed some of the cash in bank accounts that were used to pay business expenses, and he converted the rest into large denomination bills, cashier's checks, or money orders. Pet. App. 6, 8-9.

The four magazines and three video cassettes that formed the basis of the racketeering and obscenity counts on which the jury convicted petitioner consisted of an unbroken sequence of "hard core" sexual acts. The evidence showed that petitioner distributed multiple copies of these videos and magazines throughout his adult entertainment empire. J.A. 61, 63-66, 69-70, 76-79, 82-87.

2. Following the return of the guilty verdicts, the district court conducted the forfeiture proceeding. The government sought to forfeit the businesses and the real estate that represented petitioner's interest in the enterprise, see 18 U.S.C. 1963(a)(2)(A), and the property that afforded petitioner influence over the enterprise, see 18 U.S.C. 1963(a)(2)(D). The

² At sentencing, the district court found that "[t]he evidence at trial demonstrated both to the satisfaction of a very competent Jury and to this Court that the Defendant led almost single handedly a significant ongoing criminal enterprise encompassing numbers of people. The Court will not recount the extensive evidence touching the Defendant's maintenance of control over virtually every phase of the operation, from his use of professionals, to his use of nominees, to his use of secreted items and secreted accounts. The Defendant's activity was absolutely extensive involving scores of individuals over the course of many years." 8/6/90 Tr. 30-31; see also *id.* at 32-34, 36-37.

government also sought to forfeit the assets and proceeds petitioner had obtained as a result of his racketeering offenses, see 18 U.S.C. 1963(a)(1) and (a)(3). In the course of the forfeiture proceedings, the government introduced another 30 magazines and 16 videos that had been seized or purchased from petitioner's stores during the investigation, and another 9 magazines and 400 videos were offered to demonstrate the extent of petitioner's adult entertainment empire. Pet. App. 7-8, 148-150.

The jury found that petitioner had an interest in ten pieces of commercial real estate and 31 current or former businesses, all of which had been used to conduct the enterprise. 40 Tr. 8. Sitting without a jury, the district court then found that petitioner had acquired a variety of assets as a result of his racketeering activities. The court ultimately ordered petitioner to forfeit his wholesale business, the retail businesses (bookstores and video stores), and the sum of \$8,910,548.10. The forfeiture order extended to all the business's assets, which included inventory, such as magazines, books, videotapes, and sexual paraphernalia; personal property, such as televisions, video cassette players, and office furniture; and real property. Pet. App. 8-9, 134-146, 151-160.³

³ Contrary to the claim made by amici ACLU *et al.*, ACLU Amicus Br. 25-28, the government promptly notified all interested parties that it was seeking forfeiture. The government published a general notice of the forfeiture order and of its intent to dispose of the property pursuant to 18 U.S.C. 1963. Docket No. 194. On August 9, 1990, the government provided all persons known to have alleged an interest in the property with direct notice of the order and its intent to dispose of the property pursuant to 18 U.S.C. 1963. Docket No. 297.

3. On appeal, petitioner argued that the forfeiture of non-obscene expressive material under the RICO statute violates the First Amendment. The court of appeals rejected that claim. Relying on the Fourth Circuit's decision in *United States v. Pryba*, 900 F.2d 748, cert. denied, 111 S. Ct. 305 (1990), the court held that forfeiture of such material under the RICO forfeiture statute does not violate the First Amendment as long as "there is a nexus established between the ill-gotten gains from racketeering activity and the protected materials forfeited." Pet. App. 21. The court distinguished between a prior restraint and a criminal penalty imposed after a lawful racketeering conviction. *Id.* at 21-22. While the court recognized that the RICO forfeiture provisions could have some chilling effect on the exercise of First Amendment rights, the court explained that "deterrence of the sale of obscene materials is a legitimate end" of anti-obscenity laws and that any criminal sanction on obscenity is likely to have some inhibiting effect on the dissemination of expressive material. *Id.* at 22.

Petitioner also claimed that the forfeiture order violated the Eighth Amendment's ban on cruel and unusual punishments and excessive fines. The court rejected that claim. The court noted that in *Pryba* the Fourth Circuit held that the Eighth Amendment was not violated by the forfeiture of a business with total annual sales of approximately \$2 million, in which the forfeiture resulted from the seizure of obscene material worth \$105.30. Pet. App. 24-25. The court held that in this case, "[w]e cannot conclude

that the district court abused its discretion in sentencing [petitioner]." Pet. App. 25.⁴

SUMMARY OF ARGUMENT

I. The forfeiture in this case was not a prior restraint on future speech, but a penalty for past racketeering offenses. This Court's cases have made clear that, except in the most unusual circumstances,

⁴ Petitioner complains that the government sold his real property "as quickly as it could," even though he was pursuing an appeal from his convictions and the forfeiture order. Pet. Br. 6. Petitioner could have sought a stay of the district court's forfeiture order pending appeal under Fed. R. Crim. P. 38(e), but he did not do so. He argues that 18 U.S.C. 1963(f) bars a stay application by a defendant in a RICO forfeiture case, but that is not so. Section 1963(f) merely enables a third party to seek a stay when it has interests in a forfeiture action that would be put at risk; a defendant already has that right under Rule 38(e). To be sure, in light of his actions during the two months between the verdict and sentencing, petitioner might not have been able to obtain a stay without posting a significant monetary bond. During that period, petitioner transferred tons of inventory from his stores and warehouse to other locations in Minnesota and California in an effort to prevent the government from taking possession of the assets of the forfeited businesses. The district court found that he had failed to deposit sales proceeds in designated banks as ordered by the court. The district court therefore revoked petitioner's release and forfeited his \$50,000 bond. 8/30/91 Order; 8/10/90 Tr. 8-69. Absent a stay of the forfeiture order, the Marshal acted within his authority to dispose of the forfeited property and to do so in a manner that he deemed to be in the government's best interest. See *United States v. Til's Cocktail Lounge*, 873 F.2d 141, 144 (7th Cir. 1989); *United States v. Aiello*, 912 F.2d 4 (2d Cir. 1990), cert. denied, 111 S. Ct. 757 (1991); *United States v. Certain Real & Personal Property*, 943 F.2d 1292, 1296 (11th Cir. 1991).

prior restraints on speech are impermissible: The government may not forbid expressive activity in the future, but must instead wait until it has occurred and then, if it is not constitutionally protected, punish the activity after the fact.

That is what the RICO forfeiture statute does, and that is precisely what was done in this case. Petitioner was not enjoined from engaging in the distribution of expressive materials. Instead, he was punished for engaging in racketeering violations by a prison term, a fine, and a forfeiture of assets linked to his racketeering activities. The forfeiture may have the effect of limiting petitioner's ability to resume his business of distributing "adult entertainment" materials in the future, but a prison term or a fine could have the same effect, and petitioner concedes that those penalties do not constitute prior restraints.

Petitioner seeks to limit the breadth of his submission by arguing that a forfeiture constitutes a prior restraint only when it is imposed for a racketeering offense that is based exclusively on obscenity violations, and when the effect of the forfeiture is "immediately or inevitably [to] suppress speech." Pet. Br. 30. But that definition would make the constitutional status of a particular remedy turn on the hardihood of the defendant. Although petitioner concedes, as he must, that fines and prison terms for past conduct are not "prior restraints," a large fine or a long prison term could "immediately" suppress further expressive activities by an offender with marginal resources or one who lacks other associates to carry on his business in his absence.

This Court's decisions do not support petitioner's definition of prior restraint. To the contrary, the Court has held that a criminal sanction for unpro-

tected conduct is not constitutionally suspect simply because it "will have some effect on the First Amendment activities of those subject to sanction." *Arcara v. Cloud Books, Inc.*, 478 U.S. 697, 706 (1986). Because the forfeiture in this case was imposed as a penalty for past racketeering activity, it was not a prior restraint subject to a presumption of constitutional invalidity.

The forfeiture order in this case was also not constitutionally overbroad. Petitioner argues that the forfeiture of assets in a case such as this is constitutionally invalid because it will discourage others from engaging in protected expressive activities on account of fear that they will be subjected to a similar sanction. But the protection against the "chilling effect" of criminal sanctions for obscenity lies in the definition of the substantive offense. This Court has defined obscenity with sufficient specificity that persons attempting to engage in lawful speech should have no difficulty in doing so. And even if there is some marginal chilling of protected speech close to the constitutional line, the Court has held that the Constitution does not prohibit the use of any sanction that will produce some chilling of protected speech. If it did, prison terms and large fines would never be permissible sanctions for obscenity offenses.

II. The forfeiture in this case was not grossly disproportionate as a penalty for petitioner's racketeering offenses and therefore did not violate the Eighth Amendment. Contrary to petitioner's contention, the RICO forfeiture statute does not constitute a "forfeiture of estate" as that term is used in Article III of the Constitution. RICO forfeits only property that is related to the defendant's activities in connection with the racketeering enterprise. In that respect, it

is akin to traditional forfeiture remedies that Congress has provided in our law since the First Congress; it bears no resemblance to the common law "forfeiture of estate" or "corruption of blood" that the Constitution outlawed.

Petitioner failed to satisfy his burden of showing that the forfeiture here was grossly disproportionate to the magnitude of his crime. Although he now claims that the value of the property forfeited is approximately \$25 million, he failed to establish the value of the property in the district court, and in fact it appears likely that the total value of the forfeiture will be much less than that. Moreover, it is misleading for petitioner to characterize the crimes for which he was convicted as being merely seven obscenity offenses. He was convicted of conducting what the district court characterized as "an enormous racketeering enterprise," which he directed over a 20-year period. In light of the nature of the conduct for which he was convicted, petitioner has not demonstrated that the forfeiture in this case is contrary either to principles of proportionality or to the kind of penalty that he could have been assessed in other jurisdictions. The court of appeals therefore properly rejected petitioner's Eighth Amendment claim.

ARGUMENT

I. THE FORFEITURE PROVISIONS OF THE RICO STATUTE DO NOT VIOLATE THE FIRST AMENDMENT, EVEN WHEN THE PREDICATE OFFENSES ARE OBSCENITY VIOLATIONS

Petitioner contends that the forfeiture in this case violated the First Amendment, because the racketeering offense was based on obscenity violations and the forfeited property consisted of the assets of a business that dealt in expressive material. The answers to that contention are straightforward. First, the forfeiture did not constitute an unlawful prior restraint on speech, but was simply part of the punishment for petitioner's racketeering offenses. Second, the forfeiture was not invalid because of its chilling effect on protected speech; the RICO statute regulates only unprotected speech, and the forfeiture sanction does not chill lawful expressive conduct any more than do the severe prison sentences and large fines that can lawfully be imposed for obscenity violations.

A. The Post-Trial Forfeiture Order In This Case Was Not An Unlawful Prior Restraint On Speech

Petitioner does not challenge his obscenity convictions,⁵ and he concedes that the items adjudged obscene at trial can be forfeited. He challenges the remainder of the forfeiture, however. Expressive materials cannot be forfeited, he contends, unless they have been found to be obscene. And the assets of businesses dealing in expressive materials cannot be

⁵ The petition did not present such a challenge, and on October 5, 1992, this Court denied petitioner's motion to enlarge the questions presented to add such a claim.

forfeited, he argues, if the forfeiture is based on obscenity violations. According to petitioner, a forfeiture of assets falling in either of those categories constitutes a prior restraint on speech and violates the First Amendment. Pet. Br. 17-35.

1. A RICO forfeiture order is not a prior restraint on speech

A prior restraint on speech is "the imposition of a restraint on a publication before it is published," *Black's Law Dictionary* 1074 (5th ed. 1979), and consists of "an advance determination that the distribution of particular materials is prohibited," *Arcara v. Cloud Books, Inc.*, 478 U.S. 697, 705-706 n.2 (1986). "The special vice of a prior restraint is that communication will be suppressed, either directly or by inducing excessive caution in the speaker, before an adequate determination that it is unprotected by the First Amendment." *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 390 (1973).

The RICO forfeiture statute is not a prior restraint on speech within the meaning of that definition. The purpose of the RICO forfeiture provisions is not to suppress speech, but "to remove the profit from organized crime by separating the racketeer from his dishonest gains." *Russello v. United States*, 464 U.S. 16, 28 (1983). Thus, the assets at issue in this case are subject to forfeiture under RICO "not because of any likelihood of obscenity, but because they were personal property realized through or derived from crime." *Western Business Systems, Inc. v. Slaton*, 492 F. Supp. 513, 514 (N.D. Ga. 1980).⁶

⁶ Congress enacted the RICO statute in 1970. Obscenity violations were not initially included among RICO's predicate

The RICO statute provides for the forfeiture of any property that was obtained with criminal proceeds or that afforded the defendant a source of influence over a criminal enterprise. 18 U.S.C. 1963. Moreover, the statute authorizes forfeiture only after a judicial determination that the defendant committed a RICO violation. A RICO forfeiture order does not enjoin the defendant from engaging in particular activities in the future; it only deprives the defendant of assets that were related to the commission of the racketeering offenses for which he was convicted.

When expressive materials are the subject of a RICO forfeiture order, it is because of their status as assets related to racketeering violations, not because of their content or expressive nature. The RICO-forfeiture statute calls for the forfeiture of assets because of the financial role they played in the operation of the enterprise. The statute does not condemn particular items because they are thought to be obscene, but because of their role in providing financial support and incentives for racketeering activity. Thus, for purposes of RICO forfeiture, assets that happen to be in the form of expressive materials are not treated any differently than non-expressive assets, such as sports cars, narcotics, cash, or securities, that are linked to a racketeering enterprise.

In assessing the constitutionality of the RICO forfeiture statute as applied to this case, it is important

acts of racketeering. Congress included obscenity offenses in 1984, because by then the manufacture and distribution of obscene materials had become a major activity of organized crime. 130 Cong. Rec. 844 (1984) (Senator Helms) (obscenity had become the "third largest source of income for organized crime").

to note that petitioner's illegal conduct did not consist simply of the sale of three obscene books and four obscene videos. Petitioner was responsible for creating and managing an enterprise that was conducted through a pattern of illegal activities. Petitioner spent 20 years establishing the enterprise that enabled him to make shipments of obscene materials, to hide his conduct, and to dispose of the proceeds. Even a stint in prison after being convicted of conspiring to distribute obscene materials, see note 1, *supra*, did not put a halt to petitioner's business, as the district court noted at sentencing, 8 6 90 Tr. 44. The assets forfeited to the government comprised not merely the proceeds of petitioner's racketeering activity, but also his financial interest in the enterprise. The forfeiture of both expressive materials, such as magazines and video cassettes, as well as noncommunicative assets, such as real estate and business equipment, was necessary to deprive petitioner of the proceeds of his illegal conduct and the assets he had acquired and maintained in violation of the RICO statute. See 18 U.S.C. 1963(a)(1), 1963(a)(3). The RICO forfeiture provisions, both in general and as applied in this case, thus operated to punish acts of racketeering in the past, not to prohibit speech in the future.

2. *The First Amendment does not prohibit forfeiture of expressive materials or the assets of a business engaged in expressive activity*

Petitioner concedes that it would be permissible to forfeit his business assets (even assets that included expressive materials) if the business were being used for the sale of drugs or some other non-expressive criminal activities. Pet. Br. 11 n.10. In an apparent effort to make his submission more palatable by limit-

ing its breadth, he challenges the constitutionality of the RICO forfeiture statute only where the forfeiture is predicated exclusively on obscenity violations. Pet. Br. 9, 11 n.10, 29-30. But the logic of his constitutional argument sweeps much more broadly than that: It would outlaw any forfeiture having the effect of suppressing speech that had not previously been adjudged unprotected. Under the rationale of petitioner's constitutional analysis—as opposed to the statement of the position he urges for the purpose of deciding this case—the nature of the predicate racketeering offenses should have no bearing on the constitutionality of the forfeiture.

That the predicate crimes in a particular case are obscenity offenses has nothing to do with whether it is permissible to punish racketeers through the forfeiture of “expressive” or “presumptively protected” assets. If a forfeiture violates the First Amendment, it is not because of the nature of the predicate crimes, which can be, and are, severely punished by other laws; it is only because the forfeiture impermissibly curtails speech. But if a forfeiture has that effect, it is equally unconstitutional whether the predicate offenses were obscenity or drug violations; in either case, when otherwise protected assets are forfeited, the same curtailment of speech occurs. On the other hand, if the forfeiture of non-obscene expressive materials or the assets of a business engaged in expressive activities does not *per se* offend the Constitution, the use of forfeiture as a criminal sanction is not rendered unconstitutional simply because some or all of the predicate racketeering acts consist of obscenity offenses, rather than other crimes.

The question for decision, therefore, is whether the Constitution imposes a *per se* rule against punishing

criminal conduct by forfeiting nonobscene expressive materials (such as books or films), or materials that have some relation to the exercise of free speech (such as film projectors, video cassette players, or real property used for bookstores). That question must be answered in the negative.

This Court has recognized that the First Amendment does not protect purveyors of obscenity from severe criminal sanctions. See *Fort Wayne Books v. Indiana*, 489 U.S. 46, 59 n.8 (1989); *Smith v. United States*, 431 U.S. 291, 296 n.3 (1977); *Ginzburg v. United States*, 383 U.S. 463, 464-465 n.2 (1966). The States and the federal government are free to enact obscenity laws and select a variety of criminal penalties and other remedies for their violation. *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 57 (1973); *Roth v. United States*, 354 U.S. 476, 485-487 (1957); *Kingsley Books, Inc. v. Brown*, 354 U.S. 436, 441 (1957). Like Congress, a number of States have concluded that obscenity violations should be included as predicate offenses under state versions of the RICO statute, and that forfeiture of property is a legitimate means of enforcing such laws.⁷ No constitutional

⁷See Ariz. Rev. Stat. Ann. § 13-201 (West Supp. 1991); Colo. Rev. Stat. Ann. §§ 18-17-103(5)(b)(VI), 18-17-105(1)(b), 18-17-106(2) (West Supp. 1991); Conn. Gen. Stat. Ann. §§ 53-394, 53-397 (Supp. 1991); Del. Code Ann. tit. 11 §§ 1502(9)(a)(7), 1504(b), 1505(b) (Supp. 1991); Fla. Stat. Ann. §§ 895.02(1)(a)(29), 895.02(2)(a) (West Supp. 1991); Ga. Code Ann. §§ 16-14-3(9)(A)(xii), 16-14-6(a)(5), 16-14-7(a) (Supp. 1991); Idaho Stat. Ann. §§ 18-7803(a)(8), 18-1704(f) (Supp. 1991); Ind. Code Ann. §§ 34-45-6-1(2)(4), 34-4-30.5-3 (West Supp. 1991); Mo. Stat. Ann. § 207.360 (1992); N.J. Stat. Ann. §§ 2C:41-1(e), 2C:41-3, 2C:41-4(a)(9) (West Supp. 1991); N.C. Gen. Stat. §§ 75-D-3(c)(2), 75-8 (Supp. 1991); Ohio Rev. Code Ann. § 2923.31 (Anderson

principle prohibits Congress from providing enhanced penalties, such as severe prison sentences, fines, and forfeitures, for repeated or large-scale violations of obscenity laws or for violations that are part of a pattern of racketeering activity. And no constitutional principle prohibits the government from employing those penalties even though they may have the effect of burdening the operation of businesses engaged in expressive activities.

To grant expressive materials and businesses engaged in expressive activity an immunity from forfeiture sanctions would create a variety of practical and doctrinal difficulties. For example, if this Court were to adopt a rule banning the forfeiture of adult entertainment businesses, those businesses would become even more attractive targets for racketeers than they already are. See *United States v. Pryba*, 900 F.2d at 755; 2 United States Dep't of Justice, *Attorney General's Comm'n on Pornography: Final Report* 1053 (1986) ("organized crime * * * exerts substantial influence and control over the obscenity industry"). As the Fourth Circuit put it, to bar the forfeiture of assets of businesses engaged in expressive activity "would allow criminals to protect their loot by investing it in newspapers, magazines, radio and television stations. Carried to its logical end, this reasoning would allow the Colombian drug lords to pro-

1992); Okla. Stat. Ann. tit. 22 §§ 1402(10)(v), 1405(A) (West 1991); Or. Rev. Stat. Ann. § 166.715 (1992); P.R. Laws Ann. tit. 25 § 971(a) (1992); Texas Penal Code § 71.02 (Vernon 1992); Utah Code Ann. § 76-10-1602 (1992); Wash. Rev. Code Ann. §§ 9A.82.010(14)(s), 9A.82.100(4)(f) (1991); Wis. Stat. Ann. §§ 946.82(4), 946.86(1), 946.87(2)(a) (West 1991); cf. Cal. Penal Code § 186.2 (West 1992) (limited to child pornography).

tect their enormous profits by purchasing the New York Times or the Columbia Broadcasting System." *United States v. Pryba*, 900 F.2d at 755.

Moreover, petitioner's definition of a prior restraint would create an unworkable constitutional test. It is unclear whether petitioner's definition of prior restraint would invalidate all forfeitures directed at businesses involved in expressive activities, and it is unclear why it would not apply, at least in some cases, to fines and prison sentences. Petitioner argues that a forfeiture is a prior restraint because it "will immediately or inevitably suppress speech." Pet. Br. 29-30. He argues that the forfeiture in this case was a prior restraint on speech because it resulted in depriving petitioner of books and videotapes that he intended to offer for resale; because it deprived him of real and personal property that he had used and intended to continue using in his adult entertainment business; and because the forfeiture of the past proceeds of the business "will unquestionably force its closure" in the future. Pet. Br. 21. But a forfeiture of *any* assets of a company that is engaged, in whole or in part, in expressive activity may make it more difficult for the company to engage in expressive activities in the future. Yet it is highly unlikely that the forfeiture of only a small portion of the business's assets would "immediately or inevitably suppress speech." Depending on the profitability of the business, a forfeiture could be regarded in some cases as simply a cost of doing business that would have no appreciable effect on the production or marketing of expressive materials. Thus, under petitioner's test, it would be very difficult to determine whether a particular forfeiture constituted a prior restraint or not.

It is also difficult to justify petitioner's distinction between a forfeiture, which petitioner considers a prior restraint, and other penalties, which he concedes are not prior restraints and therefore can constitutionally be imposed for racketeering or obscenity offenses. Racketeering offenses carry a maximum penalty of 20 years' imprisonment; obscenity violations carry a maximum penalty of 5 years' imprisonment; and each commission of either offense can also result in a fine of up to \$250,000. A large fine would have many of the same effects on a defendant's business as a forfeiture of assets. Like the forfeiture of business proceeds, the fine would divert resources from the business, and it would impair the defendant's ability to obtain the personal and real property necessary to operate the business. A lengthy jail term for the principal in an obscenity business would have similar effects. Yet petitioner concedes, as he must, that "typical jail sentences or fines for obscenity violations remain valid." Pet. Br. 30. See *Fort Wayne Books*, 489 U.S. at 59-60; *Polykoff v. Collins*, 816 F.2d 1326, 1337-1340 (9th Cir. 1987); *511 Detroit Street, Inc. v. Kelly*, 807 F.2d 1293, 1298-1299 (6th Cir. 1986), cert. denied, 482 U.S. 928 (1987).

Petitioner's own discussion of the difference between a forfeiture and other criminal sanctions shows why his distinction does not stand up to analysis. Petitioner argues that if his punishment had been limited to six years' imprisonment and a \$100,000 fine, "his ten businesses would have surely remained open to the public." Pet. Br. 30. But that is merely to suggest that petitioner had sufficient assets (and enough cohorts) to continue his operations in spite of the prison term and fine. If the fine were larger, or if petitioner had fewer resources, the fine and term of imprison-

ment alone might have disabled him from continuing his business or discouraged him from doing so. Certainly a small forfeiture would be less likely to "suppress speech" in that manner than a large fine and prison term.

Because petitioner's definition of a prior restraint appears to turn on the effect of the sanction on the person against whom it operates, the same penalty could be a prior restraint in one case (where it was sufficient to discourage the defendant from engaging in further expressive activity) and not a prior restraint in another (where it did not have that effect). Any attempt to determine in advance the likely effect of a particular penalty on a particular defendant would be highly speculative.

Such an *ad hoc* definition of the term "prior restraint" would be unworkable as a test for the constitutional validity of particular criminal sanctions. As we show below, it is also inconsistent with this Court's cases describing prior restraints and analyzing their status in First Amendment law.

3. *This Court's decisions do not support petitioner's constitutional analysis*

In setting forth his claim that the forfeiture order in this case was a prior restraint on speech, petitioner relies principally on the leading "prior restraint" case from this Court, *Near v. Minnesota*, 283 U.S. 697 (1931). *Near*, however, involved a very different kind of remedy—a true injunction or "restraint." Its rationale does not extend to a penalty provision such as the forfeiture at issue in this case.

In *Near*, a state law provided that the publication or sale of "malicious, scandalous and defamatory" periodicals constituted a nuisance and could be enjoined under a state nuisance abatement law. *Near*

published a newspaper that contained articles ridiculing local government officials. The state court found the articles "malicious, scandalous and defamatory," and on that ground adjudged the newspaper a public nuisance. The court issued an order perpetually enjoining *Near* from producing any malicious, scandalous and defamatory publication or continuing to conduct the nuisance under the name and title of the newspaper. 283 U.S. at 704-706.

This Court struck down the injunction. The Court held that the object of the statute "[was] not punishment, in the ordinary sense, but suppression of the offending newspaper or periodical." 283 U.S. at 711. The statute embodied "the essence of censorship," *id.* at 713, because it allowed a court, upon finding that a newspaper had published defamatory matter, to enjoin further publication. The injunction exposed *Near* to contempt if any further publication were found to be defamatory, *i.e.*, if *Near* could not satisfy the court that the published matter was "true and * * * published with good motives and for justifiable ends." *Id.* at 713. Under those circumstances, this Court concluded that the injunction constituted a prior restraint on speech that violated the First Amendment. *Id.* at 713-723.⁸

Unlike the defendant in *Near*, petitioner is free to engage in the production and distribution of expressive materials in the future. The judgment in this case imposes no legal impediment to petitioner's opening another bookstore or otherwise engaging in the production and distribution of expressive material.

⁸ The Court added that "we have no occasion to inquire as to the permissible scope of subsequent punishment," 283 U.S. at 715, and it noted that its ruling did not deal with obscene materials, *id.* at 716.

See *United States v. Pryba*, 674 F. Supp. 1502, 1503 (E.D. Va. 1987), aff'd, 900 F.2d 748 (4th Cir.), cert. denied, 111 S. Ct. 305 (1990). To be sure, petitioner will not be opening that new business with the proceeds from the old one—the one that he used to sell obscene materials. But the forfeiture judgment does not bar him from distributing any material he chooses, and it does not require him to obtain prior approval for any expressive activities in which he chooses to engage. See *Arcara v. Cloud Books, Inc.*, 478 U.S. at 705-706 n.2.

Petitioner also relies on this Court's decision in *Fort Wayne Books, Inc. v. Indiana*, *supra*, but that case does not help him. In *Fort Wayne Books*, this Court struck down the pretrial seizure of the contents of several adult bookstores alleged to be engaged in the sale of obscene books and magazines. The State had filed a civil action alleging that the bookstores had violated the state RICO statute by engaging in a pattern of racketeering activity consisting of repeated violations of state law barring the sale of obscene materials. Before trial, the State obtained an order forfeiting the bookstores and their contents.

This Court reversed. The Court explained that the elements of a RICO violation and the basis for forfeiture had not yet been proved. As the Court noted, "the petition for seizure and the hearing thereon were aimed at establishing no more than *probable cause to believe* that a RICO violation had occurred, and the order for seizure recited no more than probable cause in that respect." 489 U.S. at 66 (emphasis in original). Probable cause to believe a legal violation had occurred, the Court held, "is not adequate to remove books or films from distribution." *Ibid.* Because "it remained to be proved whether the seizure was actu-

ally warranted" under the Indiana statutes, *id.* at 67, the Court held the pretrial seizure premature.

The Court in *Fort Wayne Books* assumed without deciding that "bookstores and their contents are forfeitable (like other property such as a bank account or a yacht) when it is proved that these items are property actually used in, or derived from, a pattern of violations of the State's obscenity laws." 489 U.S. at 65. Although the Court did not resolve that issue, nothing in the Court's opinion suggests that a forfeiture order cannot be enforced as a criminal sanction in a case such as this one, where the defendant has enjoyed a full trial on the merits and the government has proved beyond a reasonable doubt every element of the underlying criminal offense and the forfeitability of the assets in question. In that setting, no constitutional principle holds that the forfeiture order cannot be enforced if the subject of the order is engaged in expressive activities or some of the forfeited assets consist of expressive materials.

Vance v. Universal Amusement Co., 445 U.S. 308 (1980), *Roaden v. Kentucky*, 413 U.S. 496 (1973), *Marcus v. Search Warrant*, 367 U.S. 717 (1961), and *A Quantity of Books v. Kansas*, 378 U.S. 205 (1964), cited by petitioner, Pet. Br. 27, all of which were decided before *Fort Wayne Books* and *Arcara*, plainly do not resolve the question that the Court left open in *Fort Wayne Books* itself. Those cases, like the lower court cases cited at pages 31-32 of petitioner's brief, involved materials that were seized or otherwise restrained without a judicial determination that they were obscene. A RICO-forfeiture order does not need to be premised on a judicial determination that all the seized materials are obscene, because it is not designed to forfeit property on the ground that it is contraband. The assets in this case were ordered

forfeited not because they were believed to be obscene, but because they were part of the financial resources of a criminal enterprise. The government was not acting as a censor, but as the collector of assets used in a crime. The fact that the forfeiture may make it more difficult for petitioner to resume his activities in the adult entertainment business does not convert the forfeiture order into a prior restraint.⁹

Arcara v. Cloud Books, Inc., *supra*, illustrates that point well. In *Arcara*, state law authorized the closure of any building that was used as a place of prostitution. The owners of an adult bookstore allowed their establishment to be used for that purpose, and the county obtained an order closing the store. The state court held that the statute was not the "least restrictive means" for dealing with the problem and therefore could not constitutionally be applied to the bookstore without running afoul of the First Amendment.

This Court reversed on the ground that "the sexual activity carried on in this case manifests absolutely no element of protected expression." 478 U.S. at 705. The Court observed that "we have not traditionally subjected every criminal and civil sanction

⁹ Federal courts of appeals, including the court in this case, have held that a RICO forfeiture does not constitute a prior restraint, even if the forfeiture is based on obscenity violations. *Adult Video Ass'n v. Barr*, 960 F.2d 781, 788-790 (9th Cir. 1992); *United States v. Pryba*, 900 F.2d at 753-756; see *Sequoia Books, Inc. v. Ingemunson*, 901 F.2d 630, 634-638 (7th Cir.) (upholding Illinois obscenity forfeiture statute against First Amendment challenge), cert. denied, 111 S. Ct. 287 (1990); cf. *American Library Ass'n v. Barr*, 956 F.2d 1178, 1190-1191 (D.C. Cir. 1992) (suggesting without deciding that forfeiture under the Child Protection and Obscenity Act of 1988 would not violate First Amendment).

imposed through legal process to 'least restrictive means' scrutiny simply because each particular remedy will have some effect on the First Amendment activities of those subject to sanction." *Id.* at 706. Instead, the Court explained that it has "subjected such restrictions to scrutiny only where it was conduct with a significant expressive element that drew the legal remedy in the first place, as in [*United States v.*] *O'Brien*, [391 U.S. 367 (1968)] * * * or where a statute based on a nonexpressive activity has the inevitable effect of singling out those engaged in expressive activity * * *." *Id.* at 706-707. "Book-selling in an establishment used for prostitution," the Court explained, "does not confer First Amendment coverage to defeat a valid statute aimed at penalizing and terminating illegal uses of premises." *Id.* at 707.

Under the Court's analysis in *Arcara*, the forfeiture in this case cannot be said to be a prior restraint on speech or to violate the First Amendment in any other respect. The forfeiture order does not prohibit petitioner from distributing materials at new bookstores or video stores. See 478 U.S. at 705-706 n.2. And the conduct that "drew the legal remedy in the first place"—racketeering committed through obscenity violations—was not protected expressive conduct.¹⁰

¹⁰ The Court in *Arcara* made clear that "conduct with a significant expressive element" refers to action with a substantial speech component, such as the protest activity involved in *O'Brien*, the demonstration involved in *Grayned v. City of Rockford*, 408 U.S. 104 (1972), or the distribution of literature in *Cantwell v. Connecticut*, 310 U.S. 296 (1940). Obscenity is not "conduct with a significant expressive element," but is expressive activity that falls outside the protection of the First Amendment. And even if the expressive

Moreover, the RICO forfeiture statute does not have "the inevitable effect of singling out those engaged in expressive activity." The statute reaches a wide variety of criminal conduct, most of which has no expressive component at all. Finally, the statute does not specifically target expressive materials for forfeiture. It is only because petitioner's assets included expressive materials that the forfeiture reached presumptively protected materials at all; if petitioner had not been in possession of any magazines or films at the time of the forfeiture order, but had maintained his interest in the enterprise through other assets, the forfeiture order would simply have reached those other assets and would not have included any expressive materials.¹¹

activity at issue in this case is deemed sufficient to bring this case within the reach of *O'Brien* and its progeny, the forfeiture order in this case is still valid: The forfeiture statute is facially neutral; forfeiture serves the important governmental interest of depriving racketeers of the fruits of their criminal conduct; that interest is not related to the suppression of free speech; and it is not apparent that that interest can be served more effectively by means other than the forfeiture of the racketeer's interest in the racketeering enterprise. See *Barnes v. Glen Theatre, Inc.*, 111 S. Ct. 2456, 2461 (1991); *United States v. Albertini*, 472 U.S. 675, 687-689 (1985); *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293-294 (1984).

¹¹ A different case would be presented if a defendant could show that the forfeiture of his business was sought as a pretext for suppression of speech protected by the First Amendment. See *Arcara*, 478 U.S. at 707 n.4; *id.* at 708 (O'Connor, J., concurring). A defendant would have the burden of proof on any such claim and would have to overcome a presumption that a charging decision was made in good faith. See *Caplin & Drysdale v. United States*, 491 U.S. 617, 634-635 (1989); *Arcara*, 478 U.S. at 707 n.4. Petitioner

In sum, petitioner's effort to characterize the RICO forfeiture statute as a prior restraint on speech is inconsistent with this Court's decisions and would require the Court to adopt a definition of prior restraint that would be unworkable in many cases. The proper approach, we submit, is to adhere to this Court's traditional characterization of a prior restraint as a directive forbidding speech in the future. A punishment for past criminal conduct, whether in the form of imprisonment, a fine, or a forfeiture, is not a prior restraint and therefore is not constitutionally suspect.¹²

asserts that the government sought forfeiture in this case "for the improper purpose of destroying both protected sexually oriented expression to which it is overtly hostile as well as unprotected expression * * *." Pet. Br. 25 n.22, 25-26. Amici ACLU *et al.* make a similar claim. ACLU Amicus Br. 4-8. No such finding was made at trial, however, and in this Court petitioner has pointed to no substantial evidence to support his claim of bad faith.

Petitioner suggests that the Marshal's destruction of the forfeited books and tapes illustrates "the executive branch's censorial purpose." Pet. Br. 25 n.22. Yet the Marshal's decision that it would be better to destroy the materials than sell them to members of the public does not indicate that the purpose of the forfeiture was to suppress constitutionally protected materials. Rather, it indicates only that the government did not wish to go into the business of selling sexually explicit materials—regardless of whether they were legally obscene—and did not wish to undertake the burden of storing the materials indefinitely.

¹² There is no merit to the argument of amici American Library Association (ALA) *et al.* that the RICO forfeiture statute should be held unconstitutional because it creates an undue risk of discriminatory enforcement. ALA Amicus Br. 24-29. A defendant who believes that he has been a victim

B. The Post-Trial Forfeiture Provisions Of RICO Are Not Overbroad

Petitioner argues that the forfeiture provisions of the RICO statute are constitutionally overbroad, because they are not limited solely to obscene materials and the proceeds from the sale of such materials. Pet. Br. 35-39.

The overbreadth doctrine allows a defendant to make a facial challenge to an overly broad law restricting speech, even if his own conduct could be regulated under a more narrowly drawn statute. See, e.g., *Broadrick v. Oklahoma*, 413 U.S. 601 (1973). The RICO statute, however, does not criminalize constitutionally protected speech and thus is materially different from the statutes involved in the cases petitioner cites. For that reason, petitioner's claim is not that the RICO statute is overbroad because it outlaws protected as well as unprotected speech; rather, his claim is that applying RICO's criminal forfeiture pro-

of selective prosecution has the opportunity to prove his case; that is all the law requires.

Amici American Booksellers Foundation (ABF) *et al.* make the related claim that it is unlawful to forfeit and destroy materials that are presumptively protected under the First Amendment, because those materials might not be obscene under the standards of a different geographic community. ABF Amicus Br. 20-22. That argument does not affect the forfeiture of real property, non-expressive personal property (such as trucks and furniture), and money. But even so limited, that argument can be answered in the same way as petitioner's challenge to the Marshal's action. The government has no constitutional obligation either to sell or retain material that it owns; the government is not required to go into the business of distributing sexually oriented materials to the public, even if the materials have not been adjudged obscene.

visions to businesses that deal in expressive materials will deter others from engaging in protected speech. That will occur, he argues, because businesses will be compelled to engage in self-censorship not only to avoid criminal liability, but also to avoid the potential forfeiture of their financial enterprises.

In effect, petitioner asks this Court to reconsider a basic premise of its obscenity jurisprudence: that obscene materials can be subjected to criminal sanctions without causing an unacceptable restraint on protected speech. As this Court explained in *Miller v. California*, 413 U.S. 15, 35-36 (1973), "[w]e do not see the harsh hand of censorship of ideas—good or bad, sound or unsound—and 'repression' of political liberty lurking in every state regulation of the commercial exploitation of human interest in sex." State and federal law enforcement officials have undertaken numerous obscenity prosecutions since this Court's 1957 decision in *Roth v. United States*, 354 U.S. 476, yet there is no lack of so-called "adult" materials in the marketplace. Petitioner's own adult entertainment empire is a testament to that fact.¹³

In the end, petitioner's argument is with *Miller* itself and with Congress's decision to criminalize the interstate distribution of obscene material. See 18 U.S.C. 1465. Taken to its logical end, petitioner's "chilling" argument would effectively overturn the Court's decision in *Miller*, because the existence of

¹³ Petitioner asserts that the effect of the forfeitures in this case has been to eliminate virtually all outlets for erotic materials from the Minneapolis/St. Paul area. Pet. Br. 4, 20. That assertion is contrary to the testimony of petitioner's own expert, who stated that there were 104 stores in the Minneapolis/St. Paul area where "adult" videos were sold. 26 Tr. 46-51.

any sort of criminal penalty, no matter how insignificant, could conceivably chill those who deal in erotic materials. See *Smith v. California*, 361 U.S. 147, 154-155 (1959).

The petitioners in *Fort Wayne Books* made precisely that claim, arguing that the application of a state RICO statute to obscenity violated the First Amendment because "the sanctions imposed on RICO violators are so 'draconian' that they have an improper chilling effect on First Amendment freedoms." 489 U.S. at 59. The Court rejected that argument. The Court acknowledged that the prison sentence and fine authorized by the state RICO statute were more severe than the ones authorized for a simple obscenity crime and that, as a result, "some cautious booksellers will practice self-censorship and remove First Amendment protected materials from their shelves." 489 U.S. at 60. But the Court went on to find that "deterrence of the sale of obscene materials is a legitimate end of state antiobscenity laws, and our cases have long recognized the practical reality that 'any form of criminal obscenity statute applicable to a bookseller will induce some tendency to self-censorship and have some inhibitory effect on the dissemination of material not obscene.'" *Ibid.* (quoting *Smith*, 361 U.S. at 154-155). The Court added that "[t]he mere assertion of some possible self-censorship resulting from a statute is not enough to render an anti-obscenity law unconstitutional." *Ibid.*

The analysis in *Fort Wayne Books* is fully applicable here. The mere possibility of self-censorship flowing from the use of a prosecutorial weapon such as post-trial forfeiture does not mean that the use of such a tool must be disallowed. As this Court made clear in *Fort Wayne Books*, "[i]t is not for this

Court . . . to limit the State in resorting to various weapons in the armory of the law." 489 U.S. at 60 (quoting *Kingsley Books, Inc. v. Brown*, 354 U.S. 436, 441 (1957)). This Court has already undertaken to safeguard First Amendment interests by carefully defining the boundary between protected speech and obscenity in *Miller* and related cases. To go further and limit the penalties that can be imposed on those in the business of purveying obscenity would be an inappropriate form of double counting. Cf. *Calder v. Jones*, 465 U.S. 783, 790 (1984) (noting that the "potential chill on protected First Amendment activity" has been "taken into account in the constitutional limitations on the substantive law"; declining to adopt additional restrictions for personal jurisdiction).

This Court's decision last Term in *Simon & Schuster, Inc. v. Members of the New York State Crime Victims Board*, 112 S. Ct. 501 (1991), does not support petitioner's overbreadth analysis. *Simon & Schuster* held unconstitutional the New York "Son of Sam" law, which required that an accused or convicted criminal's income from works describing his crime be deposited in an escrow account to be made available to the victims of the crime and the criminal's other creditors. The law impermissibly created a financial disincentive to the exercise of First Amendment rights, the Court determined, by "singl[ing] out income derived from expressive activity for a burden the State places on no other income," and by targeting "only * * * works with a specified content." 112 S. Ct. at 508.

Unlike the "Son of Sam" law, the forfeiture provisions of the RICO statute do not target expressive activity; they merely deny defendants the enjoyment

of assets derived from or used in illegal activities. What is more, the racketeering statute is limited to defendants convicted of crimes and to the profits they obtain from their racketeering activities. See 112 S. Ct. at 511 ("Son of Sam" law did not require a conviction and was not limited to proceeds of criminal activities). This Court acknowledged in *Simon & Schuster* that the government has a "compelling interest" in taking the profit out of crime. *Id.* at 510. That is precisely the purpose of the RICO forfeiture statute.

Nor is the threat of forfeiture any more "chilling" than the threat of a prison term or a fine. Imprisonment places an enormous restraint on a person's opportunity for speech, see *Pell v. Procunier*, 417 U.S. 817 (1974), to say nothing of his prospects for maintaining an outside business venture while he is in prison, yet petitioner cannot dispute that obscenity crimes can be punished by imprisonment. Here, petitioner received a six-year prison term and a \$100,000 fine.¹⁴ As we have noted, petitioner faced even greater potential penalties: If the indictment had charged him only with obscenity offenses, petitioner would have been subject to 60 years' imprisonment and a \$3 million fine.¹⁵ Given petitioner's advanced age,

¹⁴ In addition, the district court imposed a \$950 special assessment; the costs of incarceration, calculated at \$1,415.56 per month; the costs of supervised release, calculated at \$96.66 per month; and the costs of prosecution, determined to be \$29,737.84.

¹⁵ Petitioner faced a maximum cumulative sentence of 171 years' imprisonment and approximately \$6,400,000 in fines. Gov't C.A. Br. 54. Petitioner could have received 60 years' imprisonment and fines totalling \$750,000 on the RICO counts alone. *Ibid.*

Pet. Br. 4, the prospect of being imprisoned for 60 years should have had a chilling effect far greater than the possibility of any sort of forfeiture. Just as a fine "cannot approximate in severity the loss of liberty that a prison term entails," *Blanton v. City of North Las Vegas*, 489 U.S. 538, 542 (1989), the forfeiture of petitioner's business inventory pales in comparison with the threat of such a lengthy prison term.

The Court has tolerated some degree of voluntary self-censorship as a consequence of governmental efforts to control obscenity. At the same time, the Court has sought to limit such censorship by strictly defining obscenity and by ensuring that each obscenity statute requires proof that a defendant was aware of the nature of the materials he was distributing. See *Hamling v. United States*, 418 U.S. 87, 123 (1974); *Mishkin v. New York*, 383 U.S. 502, 511 (1966); *Smith v. California*, 361 U.S. at 152-155. But as long as an obscenity law meets those requirements, significant penalties may be imposed for the distribution of obscene materials. See, e.g., *Fort Wayne Books*, 489 U.S. at 59-60 (upholding state RICO statute); *Roth v. United States*, 354 U.S. at 479 n.1 (upholding federal obscenity law with penalties of up to five years' imprisonment and a \$5,000 fine); *Ginzburg v. United States*, 383 U.S. at 464 n.2 (same). If the chill felt by persons from the risk of being imprisoned for the distribution of obscene materials does not offend the First Amendment, neither does the chilling effect that the RICO forfeiture law may have, even on parties who are in that business. See *Arcara*, 478 U.S. at 705 ("neither the press nor booksellers may claim special protection from governmental regulations of general applica-

bility simply by virtue of their First Amendment protected activities").¹⁶ In addition, before a forfeiture judgment can be entered there must be a finding that property was purchased with proceeds from the illegal enterprise, or was used to exert control over the racketeering activity. The mere prospect of a forfeiture, then, is not sufficient to have an unacceptable chilling effect on protected speech.¹⁷

¹⁶ See also *Branzburg v. Hayes*, 408 U.S. 665, 685 (1972) (otherwise valid laws may be enforced against the press as against other citizens even though such enforcement has the potential marginally to reduce the circulation of information); *Associated Press v. NLRB*, 301 U.S. 103, 132 (1937) ("The publisher of a newspaper has no special immunity from the application of general laws.").

¹⁷ *NAACP v. Alabama*, 377 U.S. 288 (1964), the case that petitioner identifies as "[p]erhaps most directly analogous" to this one on the overbreadth issue, Pet. Br. 38, has little in common with this case. There, the State sought to bar the NAACP from conducting business in Alabama because of its support for the Montgomery bus boycott. The Court concluded that, even assuming that conduct violated a valid state law, "such a violation could not constitutionally be the basis for a permanent denial of the right to associate for the advocacy of ideas by lawful means." 377 U.S. at 307. In this case, petitioner has not been enjoined from continuing his involvement in the adult entertainment business. While the criminal penalties for his racketeering activities have doubtless made it more difficult for him to do so, the difference between penalizing past criminal conduct and barring speech-related conduct in the future is, once again, a critical distinction under the First Amendment analysis. *NAACP v. Alabama* is therefore inapposite for the same reason that prior restraint cases such as *Near v. Minnesota*, *supra*, are inapplicable to the forfeiture in this case.

II. THE FORFEITURE IN THIS CASE DOES NOT VIOLATE THE EIGHTH AMENDMENT

Petitioner argues that his sentence violates the Eighth Amendment's prohibition against excessive fines and cruel and unusual punishments. Pet. Br. 40-49.¹⁸ He does not challenge his six-year prison term, nor does he attack his fine or the requirement that he pay the costs of his prosecution, his incarceration, and his supervised-release. Rather, he argues only that the magnitude of the forfeiture, by itself or atop his other penalties, is disproportionate to the gravity of his crimes.

A. The RICO Forfeiture Provisions Are Not Facially Unconstitutional

Petitioner argues that the RICO forfeiture provisions are facially unconstitutional since they are the modern-day version of the "forfeiture of estate" that the Framers outlawed in Art. III, § 3, Cl. 2. Pet. Br. 43-44. A RICO forfeiture, however, is not remotely similar to a common law forfeiture of estate.

RICO requires forfeiture of property that an offender acquired or maintained through a pattern of racketeering activity (or a conspiracy to commit such activity); property that gives an offender a source of influence over a racketeering enterprise; and property constituting, or derived from, the proceeds of racketeering activity. 18 U.S.C. 1963(a)(1)-(3). Forfeiture under RICO is thus limited to property linked to racketeering activity. By contrast, the common law forfeiture of estate divested felons and traitors

¹⁸ We agree with petitioner that a RICO forfeiture can be examined under the Eighth Amendment, since Congress by statute has made forfeiture a criminal punishment.

of all real and personal property, disentitled children to inherit the property of their parent, and corrupted the blood of the felon or traitor, thereby barring any descendant from tracing a line of inheritance through him. Note, *Bane of American Forfeiture Law—Banished at Last?*, 62 Cornell L. Rev. 768, 770, 773-774 (1977). The Framers outlawed that brand of forfeiture, not forfeitures related to illegal conduct, which have been a part of our law since the time of the Framers. See *United States v. Grande*, 620 F.2d 1026, 1037-1039 (4th Cir.), cert. denied, 449 U.S. 919 (1980).¹⁹

Forfeiture traces its roots to early Roman, Greek, and Biblical law.²⁰ Colonial courts regularly exercised *in rem* jurisdiction to enforce English and local forfeiture laws against goods and vessels used in violation of the customs and revenue laws. Statutes

¹⁹ The courts that have addressed the issue have uniformly held that criminal forfeitures do not violate Art. III, § 3, Cl. 2. See *United States v. Grande*, 620 F.2d 1026 (4th Cir.), cert. denied, 449 U.S. 919 (1980); *United States v. Pryba*, 674 F. Supp. at 1517; *United States v. Anderson*, 637 F. Supp. 632, 634 (N.D. Cal. 1986), rev'd on other grounds *sub nom. United States v. Littlefield*, 821 F.2d 1365 (9th Cir. 1987); *United States v. Thevis*, 474 F. Supp. 134, 140-141 (N.D. Ga. 1979), aff'd, 665 F.2d 616 (5th Cir. 1982), cert. denied, 456 U.S. 1008 (1983); cf. *United States v. Distillery in West Front Street*, 25 F. Cas. 866 (D. Del. 1870) (No. 14,965) (upholding *in rem* forfeiture over Forfeiture Clause challenge).

²⁰ See Exodus 21:28 ("If an ox gore a man or a woman, that they die: then the ox shall be surely stoned, and his flesh shall not be eaten; but the owner of the ox shall be quit."); 7 Twelve Tables 1, translated in J. Scott, *The Civil Law* 69 (1932); Oliver Wendell Holmes, *The Common Law* 8 (1881).

providing for forfeiture of property involved in criminal activity were among the earliest laws enacted by Congress,²¹ and a number of current federal statutes call for the confiscation of property that is used in criminal undertakings.²² This Court has consistently sustained the constitutionality of forfeiture laws, even when applied to the property of an owner who was uninvolved in or unaware of an act subjecting the property to confiscation, over claims that forfeiture results in a deprivation of property without due process or a taking without just compensation.²³

²¹ See, e.g., Act of July 31, 1789, ch. 5, §§ 12, 36, 1 Stat. 39, 47 (forfeiture of ships and cargoes involved in customs violations); Act of Aug. 4, 1790, ch. 35, §§ 12-16, 22, 27-28, 67, 1 Stat. 157-159, 161, 163-164, 176 (same); Act of Mar. 22, 1794, ch. 11, 1 Stat. 347 (vessels used to deliver slaves to foreign countries); *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 682-683 (1974).

²² See, e.g., 8 U.S.C. 1324 (conveyances used for smuggling and harboring illegal aliens); 18 U.S.C. 545 (goods smuggled into the country); 18 U.S.C. 981-982 (general forfeiture law); 18 U.S.C. 1467 (obscene material); 18 U.S.C. 2253-2254 (unlawful visual depiction of a minor); 19 U.S.C. 1497 (undeclared customs items); 19 U.S.C. 1594 (conveyances subject to penalty for violation of customs laws); 19 U.S.C. 1595a (conveyances used to smuggle items); 21 U.S.C. 853, 881 (controlled substances violations); 26 U.S.C. 7301 (revenue violations); 28 U.S.C. 2514 (fraud against the United States); 49 U.S.C. 782 (vessels used to transport controlled substances); 50 U.S.C. App. 16 (vessels used to trade with the enemy).

²³ See, e.g., *Calero-Toledo*, 416 U.S. at 676-690; *Van Oster v. Kansas*, 272 U.S. 465 (1926); *United States v. One Ford Coupe Automobile*, 272 U.S. 321, 332-333 (1926); *J.W. Goldsmith, Jr.-Grant Co. v. United States*, 254 U.S. 505, 510-511 (1921); *Dobbins's Distillery v. United States*, 96 U.S. 395,

In light of the parallel between the RICO forfeiture statute and the forfeiture laws that have consistently been enacted and upheld since the 18th century, there is no merit to petitioner's claim that the RICO forfeiture laws constitute a facially invalid "forfeiture of estate."

B. The Forfeiture In This Case Is Not Unconstitutional

In *Harmelin v. Michigan*, 111 S. Ct. 2680 (1991), a plurality of the Court determined that the Cruel and Unusual Punishments Clause plays a limited role in regulating the proportionality of criminal punishments.²⁴ The plurality concluded that "the Eighth Amendment does not require strict proportionality between crime and sentence. Rather, it forbids only extreme sentences that are 'grossly disproportionate' to the crime." *Id.* at 2705 (quoting *Solem v. Helm*, 463 U.S. 277, 288 (1983)). The plurality also noted that "in the rare case in which a threshold comparison of the crime committed and the sentence

401 (1878); *United States v. The Brig Malek Adhel*, 43 U.S. (2 How.) 210 (1844).

²⁴ In *Harmelin*, this Court upheld by a 5-4 vote the sentence of life imprisonment without possibility of parole for possession of 1.5 pounds of cocaine, but the five-Member majority did not agree on a rationale. Under these circumstances, the Court has said, the judgment of the Court is the position of the three-Member plurality, since it was the narrowest rationale for the result. *Marks v. United States*, 430 U.S. 188, 193 (1977) ("When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds . . .'" (quoting *Gregg v. Georgia*, 428 U.S. 153, 169 n.15 (1976) (lead opinion))).

imposed leads to an inference of gross disproportionality" between the two, "intra- and inter-jurisdictional analyses" may be appropriate," 111 S. Ct. at 2707, in order to ensure that "proportionality review by federal courts * * * [is] informed by objective factors to the maximum extent possible," *id.* at 2704 (citations and punctuation omitted). Under that analysis, the forfeiture in this case is not unconstitutional.

1. The forfeiture in this case is not "grossly disproportionate" to petitioner's crimes

As a general matter, a forfeiture under RICO is not an unduly onerous penalty. The forfeiture of property is not comparable in severity to the punishment of death or life imprisonment. Although a forfeiture, like a fine, may "engender a significant infringement of personal freedom," forfeiture "cannot approximate in severity the loss of liberty that a prison term entails." *Blanton*, 489 U.S. at 542. A forfeiture under RICO therefore cannot be said to be remotely as severe as the penalties at issue in *Harmelin* (life imprisonment without parole); *Solem v. Helm*, *supra* (life imprisonment without parole); *Hutto v. Davis*, 454 U.S. 370 (1982) (40 years' imprisonment); and *Rummel v. Estelle*, 445 U.S. 263 (1980) (life imprisonment with possibility of parole).

Property can be confiscated under RICO only if it is tied to the activities of a racketeering enterprise. Accordingly, however severe may be the forfeiture of property under the racketeering laws, a person who has used property to commit a crime or acquired property with the proceeds of illegal activity has, at the very least, a vastly reduced moral claim to the

continued use or enjoyment of such property or its fruits. Cf. *Caplin & Drysdale*, 491 U.S. at 626 (robber has no right to the proceeds of his crime).

Congress "could with reason conclude" that crimes such as petitioner's are "momentous enough to warrant" forfeiture of every asset tied to his racketeering enterprise. *Harmelin*, 111 S. Ct. at 2706. It was rational for Congress to conclude that the use of a racketeering enterprise to commit crimes, particularly an enterprise as enduring as the one established and operated by petitioner, presents special risks to society not present when a person commits an isolated offense. The government's interest is similar to the one underlying recidivist laws: namely, to deal "in a harsher manner with those who by repeated criminal acts have shown that they are simply incapable of conforming to the norms of society as established by its criminal law." *Rummel*, 445 U.S. at 276. Congress could reasonably conclude that a fitting punishment for conduct of the sort at issue in this case was to strip petitioner of his business and its proceeds to ensure that he did not profit from his crimes. See *Caplin & Drysdale*, 491 U.S. at 630; *Russello*, 464 U.S. at 28; cf. *Simon & Schuster*, 112 S. Ct. at 510.

That penalty is not rendered any less appropriate because the underlying predicate offenses were obscenity violations. Congress has treated the distribution of obscene materials as a serious offense that is inimical to "the social interest in order and morality." *Roth*, 354 U.S. at 485. Petitioner maintains that obscenity violations are not serious offenses because they are victimless crimes. Pet. Br. 45. This Court, however, rejected a similar argument in *Paris Adult Theatre I v. Slaton*, 413 U.S. at 57-69, where it con-

cluded that the States and federal government could treat obscenity violations as serious felonies notwithstanding their characterization as regulatory offenses having no direct victims.²⁵

The forfeiture in this case is limited to assets that the government proved were connected to petitioner's racketeering enterprise. Pet. App. 151-160. Petitioner does not challenge the sufficiency of the government's proof regarding the racketeering activities or the enterprise, nor does he claim that the assets in question are not subject to forfeiture under the RICO statute. Under these circumstances, the forfeiture of the assets linked to petitioner's racketeering offenses cannot be said to be "grossly disproportionate" to his crimes. See *United States v. Grande*, 620 F.2d at 1039 ("The magnitude of the forfeiture is directly keyed to the magnitude of the defendant's interest in the enterprise conducted in violation of law.").

Petitioner maintains that the forfeiture of what he alleges is a \$25 million business atop his other penalties is an unduly severe punishment for seven obscen-

²⁵ Even if one accepts the moral argument that obscenity offenses, unlike property crimes and crimes against persons, ordinarily have no direct victims, it is nonetheless the case that obscenity offenses are often directly associated with, or provide sustenance to, highly dangerous criminal organizations and activities. See 2 United States Dep't of Justice, *Attorney General's Comm'n on Pornography: Final Report* 1055 (July 1986): "In addition to the myriad of other harms and anti-social effects brought about by obscenity there is a link between traditional organized crime group involvement in the obscenity business and many other types of criminal activity. Physical violence, injury, prostitution and other forms of sexual abuse are so interlinked in many cases as to be almost inseparable except according to statutory definitions." See also *id.* at 1055-1065.

ity violations. Pet. Br. 41. As we have shown, however, petitioner's offenses involved much more than the simple commission of seven obscenity offenses. Moreover, petitioner did not make a proffer in district court of the value of the forfeited assets; he cites no record evidence to support that claim, and we are aware of none. The government's valuation of the forfeited assets has not yet been completed, but it appears certain that the value of the assets will be far less than petitioner estimates.²⁶ Petitioner was afforded the opportunity to present evidence on the proportionality issue at two post-conviction forfeiture hearings (on May 24 and June 25, 1990), but he failed to establish a prima facie case that the forfeiture was excessive. In short, petitioner bears the burden of proving that his sentence is unconstitutional, see *Stanford v. Kentucky*, 492 U.S. 361, 373 (1989), and he has not met that burden.

On this record, the court of appeals was correct in declining to undertake the "proportionality review" that petitioner urges on this Court. Petitioner has failed to establish a prima facie case that the for-

²⁶ According to a July 15, 1992, inventory of the forfeited assets that was prepared at petitioner's request by the Marshal, the government has recovered less than \$1 million from the forfeiture in this case. Most of the 15 forfeited bank accounts had been closed at the time of the forfeiture, and those still active had a negligible or negative balance. Of the forfeited "businesses," 18 were essentially the same entity, representing simply the different names petitioner had assigned to his sole proprietorship over the years. As of July 15, 1992, the government had recovered only \$791,489.84 from the sale of nine parcels of real estate, a public auction of personal property, a private sale of television and video cassette recorder parts, and the recovery of cash in petitioner's bank accounts and at his stores.

feiture in this case was excessive. Thus, as in *Pryba*, the only other case involving a similar forfeiture,²⁷ petitioner was afforded an evidentiary hearing on the issue of proportionality, but he failed to "proffer the information that would be required" to trigger a proportionality review. 900 F.2d at 757.

2. *The forfeiture in this case is not a penalty that society has rejected as too severe for crimes such as petitioner's*

Even if this Court found necessary the type of comparative analysis discussed in other cases, petitioner could not prevail. The objective evidence shows that a racketeering forfeiture is not a penalty that society has rejected as unduly severe. Forfeiture is an ancient punishment; Congress has adopted forfeiture statutes for various crimes; and 19 States impose forfeiture as a remedy for racketeering offenses based on obscenity violations. See pages 16-17, *supra*. Under these circumstances, there is no semblance of a national consensus that forfeiture of a defendant's interest in a racketeering enterprise and its proceeds is unconstitutional. Cf. *Stanford v. Kentucky*, 492 U.S. at 370-373.

When viewed in light of the particular facts of this case, it is even clearer that there is no national consensus barring forfeiture of the kind ordered here. The district court conducted a proportionality review

²⁷ In *Pryba*, the government obtained all the assets of the defendant's enterprise—three bookstores, eight video stores, and approximately \$1 million in other assets—even though the proof showed that the defendants sold legally obscene materials worth a total of only \$105.30. The court of appeals upheld the forfeiture because sale of the materials was part of a pattern of racketeering activity. 900 F.2d at 748.

and concluded that "the evidence demonstrates beyond a reasonable doubt that the sum sought to be forfeited is not beyond the scope of the enterprise proven." Pet. App. 159-160. In particular, the court held that the magnitude of the forfeiture was justified in light of the "enormous racketeering enterprise" that petitioner conducted over a lengthy period of time. *Id.* at 160. Petitioner did not offer in the lower court, and has not offered here, any evidence that a forfeiture of assets of the kind and size at issue in this case would be regarded in any other jurisdiction as a disproportionate penalty for offenses of the sort petitioner committed. The court of appeals therefore did not err in upholding the forfeiture against petitioner's Eighth Amendment challenge.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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OCTOBER 1992

APPENDIX

1. Article III, § 3, Cl. 2, of the Constitution of the United States provides:

The Congress shall have Power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the person attainted.

2. The First Amendment to the Constitution of the United States provides in part:

Congress shall make no law * * * abridging the freedom of speech[.]

3. The Eighth Amendment to the Constitution of the United States provides:

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

4. 18 U.S.C. 1962 provides:

(a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in or the activities of which affect, interstate or foreign commerce.

(1a)

(b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section.

18 U.S.C. 1963 provides in part:

(a) Whoever violates any provision of section 1962 of this chapter shall be fined under this title or imprisoned not more than 20 years (or for life if the violation is based on a racketeering activity for which the maximum penalty includes life imprisonment), or both, and shall forfeit to the United States irrespective of any provision of State law—

(1) any interest the person has acquired or maintained in violation of section 1962;

(2) any—

- (A) interest in;
- (B) security of;
- (C) claim against;

(D) property or contractual right of any kind affording a source of influence over

any enterprise which the person has established, operated, controlled, conducted, or participated in the conduct of in violation of section 1962; and

(3) any property constituting, or derived from, any proceeds which the person obtained, directly or indirectly, from racketeering activity or unlawful debt collection in violation of section 1962.

The court, in imposing sentence on such person shall order, in addition to any other sentence imposed pursuant to this section, that the person forfeit to the United States all property described in this subsection.

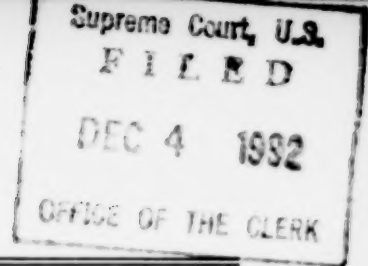
(b) Property subject to criminal forfeiture under this section includes—

(1) real property, including things growing on, affixed to, and found in land; and

(2) tangible and intangible personal property, including, rights, privileges, interests, claims, and securities.

(c) All right, title, and interest in property described in subsection (a) vests in the United States upon the commission of the act giving rise to the forfeiture under this section. * * *

No. 91-1526



In The
Supreme Court of the United States
October Term, 1992

FERRIS J. ALEXANDER, SR.,
Petitioner,
vs.

UNITED STATES OF AMERICA,
Respondent.

**On Writ Of Certiorari To The
United States Court Of Appeals
For The Eighth Circuit**

REPLY BRIEF ON THE MERITS

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No. 91-1526

In The

Supreme Court of the United States

October Term, 1992

FERRIS J. ALEXANDER, SR.,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari To The
United States Court Of Appeals
For The Eighth Circuit

REPLY BRIEF ON THE MERITS

I

**THE GOVERNMENT HAS PROPOSED A RADICAL
NEW PRIOR RESTRAINT FORMULA THAT WOULD
HAVE DISASTROUS CONSEQUENCES FOR FREEDOM
OF SPEECH.**

The Government has ascribed to Petitioner a theory of prior restraint which he neither espoused nor advocated, and has advanced a dangerous, formalistic, and radical theory of prior restraint. Premised upon nothing more than the talismanic label of "punishment," the Government's theory both disregards this Court's precedents, and, more significantly, completely ignores the enormous and disastrous long-term consequences for protected expression if this Court were to adopt this dangerously simplistic "form-over-substance" test.

A. Based On Nothing More Than The Talismanic Label "Punishment," The Government Has Proposed A Definition Of Prior Restraint Which Utterly Divorces That Doctrine From Any Of The Underlying Policies It Was Originally Created To Serve.

With no precedent from this Court to support it, and with utter disregard for its future impact upon protected expression, the Government has adopted a theory of prior restraint which would allow the total destruction of any media business if justified as "punishment" for speech violations such as obscenity, libel, jeopardizing national security, or false advertising. The Government simply ignores the underlying policies and values which the prior restraint doctrine was created to protect.

For example, under the Government's theory, had this Court not intervened in *Jenkins v. Georgia*, 418 U.S. 153 (1974), and had RICO existed in 1974, the federal government could have forfeited the motion picture studio that produced the film "Carnal Knowledge," simply because its producers failed to foresee a prosecution and conviction for obscenity. Similarly, under the Government's theory, Congress could add RICO-type forfeitures as penalties for defamation, false advertising, and media national security violations, and merely by labeling the forfeiture as "punishment," forfeit *The New York Times* or CNN for any such error in judgment.¹

Essentially, the purpose of the prior restraint doctrine is to prevent government from using its significant power to suppress free and robust expression, either by direct restraint

¹ Indeed, if this Court upholds blanket forfeiture of media businesses for prior speech violations, the use of such tools on a widespread basis will no doubt become commonplace. As the Government points out in its Brief (hereinafter "G.B.") at 16-17, n.7, merely within the last few years, a large number of states have enacted their own "baby RICO" laws with obscenity predicates.

or by intimidation and self-censorship.² Yet, that purpose is necessarily thwarted by a scheme which allows blanket forfeiture of huge media businesses for even the most *de minimis* of speech violations.³

² Petitioner has challenged RICO forfeiture herein primarily based upon its direct prior restraint impact upon *his own business*, since the forfeiture order directly suppressed and destroyed huge inventories of his media materials, and also necessarily made it impossible for his businesses to continue their lawful speech activities. However, Petitioner is, of course, aware that this Court has pointed out that "[t]he special vice of a prior restraint is that communication will be suppressed, *either directly or by inducing excessive caution in the speaker.* . . ." *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 390 (1973) (Emphasis added). Although the Government correctly quotes this language from *Pittsburgh Press* (G.B. 12), it inexplicably advocates an absolutist position that there are no constitutional limits on the chilling effect of any punishment (G.B. 30). Obviously, this position is not only inconsistent with this Court's articulation of the prior restraint doctrine in *Pittsburgh Press*, but is also inconsistent with its decisions in *Smith v. California*, 361 U.S. 147 (1959), and *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), both of which held that the chilling effect of sanctions for alleged prior speech violations may subject the sanction to constitutional scrutiny and potential limitation or invalidation. It would be hard to imagine a sanction (other than perhaps the death penalty) that would have a more chilling effect on the entire media industry than a law which allows the slightest speech violations by any media business to be punished by the total forfeiture and destruction of that entire business.

³ The extent of RICO forfeiture ordered in any particular case is not a function of the extent of criminality, but is solely the result of the *size* of the defendant's business. When directed at media businesses, the extent of this "punishment" will necessarily increase in direct proportion to the amount of speech activity the business is engaged in.

For example, a highly successful mainstream newspaper or television network that commits a very rare "speech crime" will necessarily forfeit far more than would a much smaller business committing precisely the same offense, even though the only distinction between the two is the far greater amount of constitutionally protected expression that the larger business has engaged in over many years. Such a scheme surely cannot be consistent with basic First Amendment principles.

The Government has equivocated on its definition of prior restraint. It has unambiguously asserted that a legislative purpose of "punishment" should exempt any sanction from challenge as a prior restraint. However, the Government has also conceded (as it must under *Near* and *Organization For A Better Austin*) that punishment of speech violations by *injunctions* or other *legal impediments* against future expression,⁴ are unconstitutional prior restraints. Under both this Court's prior decisions and under the fundamental policies which underlie the First Amendment, neither of these two proposed "litmus tests" for prior restraint is tenable.

First, it is clear that the talismanic label "punishment" cannot be the constitutional test for distinguishing between a permissible sanction and an impermissible prior restraint. As noted above, such a test would allow the wholesale destruction of a free press by permitting unlimited sanctions for even *de minimis* speech-related offenses. Under such a dangerous constitutional principle, no newspaper, magazine or television station in the land would be safe.

Moreover, while the Government simply asserts, without supporting authority, that no sanction can be condemned as a prior restraint if the purpose underlying the sanction includes "punishment," that is clearly not what this Court said in *Near*. *Near* noted that no criminal punishment was involved in that case and then expressly stated: "[w]e have no occasion to inquire as to the permissible scope of subsequent punishment." 283 U.S. at 715 (emphasis added). By stating that it had no occasion to inquire as to the *permissible* scope of subsequent punishment, this Court clearly implied that there would be a limit to the scope of punishment that would be

⁴ The Government asserts that "[t]he judgment in this case imposes no legal impediment to Petitioner's opening another bookstore" (G.B. 21) and similarly asserts that "the forfeiture judgment does not bar [Petitioner] from distributing any material he chooses, and it does not require him to obtain prior approval for any expressive activities. . . ." (G.B. 22.) The implicit assertion here is that while injunctive orders and licensing requirements may constitute prior restraints (on the theory that they constitute purely "legal" impediments to expression), nothing else does.

constitutionally permissible. If the very injunctive order in *Near* had been issued as "punishment" for a violation of the libel laws, obviously this Court would not have hesitated to condemn it as an impermissible prior restraint. Because the Government has no answer to this obvious flaw in its "punishment" argument, it has simply chosen to avoid any discussion of this language in *Near*.

The Government's other proposed constitutional test for a "prior restraint" is equally flawed, *i.e.*, its assertion that the only sanctions which can be prior restraints are *injunctions* or other sanctions which impose *legal impediments* to future expressive activities.⁵ Yet this distinction is no more consistent with fundamental First Amendment guarantees than the Government's equally formalistic distinction based upon the criterion of "punishment." However, before demonstrating why this test is equally useless as a limit on the prior restraint doctrine, Petitioner will explore the significance of the Government's concession that legal impediments, such as an injunction, are unconstitutional prior restraints when imposed for prior obscenity violations.

Under its apparent assertion that the only unconstitutional sanctions for prior speech violations are those imposing "legal barriers" to future speech such as injunctions, the Government is tacitly conceding that RICO's "civil" injunctive remedies are unconstitutional as applied in an obscenity-predicated RICO case to authorize a district court to impose "reasonable restrictions on the future activities of any person, including . . . prohibiting any person from engaging in the same type of endeavor as the enterprise engaged in. . . ." 18 U.S.C. § 1964(a).

The Government's distinction between obscenity-predicated injunctions and all other forms of obscenity sanctions would also require the affirmance of the multitude of cases cited by Petitioner which struck down as impermissible prior restraints public nuisance laws enjoining the future operation of any businesses which had committed prior obscenity

⁵ See footnote 4, *supra*.

offenses. Brief of Petitioner ("B.P.") at 31-32, n.25. Similarly, the Government's position conceding the unconstitutionality of injunctions in this area would also support the substantial authorities cited by Petitioner invalidating laws revoking or denying a permit to engage in speech activities because of an obscenity violation. (B.P. at 32, n.26.) Like injunctions, the denial or revocation of a license necessarily imposes a legal impediment precluding all future expression.

While these tacit concessions are no doubt constitutionally required, it is equally clear that they do not go far enough. The assertion that prior restraints can take no form other than *legal impediments* to expression is clearly at odds with a multitude of this Court's prior decisions, as well as underlying constitutional policy. In a legion of cases referenced in the Brief of Petitioner at 27, this Court has held that mass seizures of presumptively protected expression constitute "the most effective restraint possible," *Marcus v. Search Warrants of Property*, 307 U.S. 717, 736 (1961) and, in *Roaden v. Kentucky*, 413 U.S. 496 (1973), expressly held that the type of seizures condemned in *Marcus*, *A Quantity of Books v. Kansas*, 378 U.S. 205 (1964), and *Lee Art Theatre, Inc. v. Virginia*, 392 U.S. 636 (1968), "is plainly a form of prior restraint. . . ." 413 U.S. at 504.⁶ Yet mass seizures are not *legal impediments*. Rather, they are quite obviously severe and insurmountable *practical common sense impediments* to expression.⁷ Another example is the type of prior restraint

⁶ Similarly, in *Fort Wayne Books, Inc. v. Indiana*, 489 U.S. 46, 63-64 (1989), this Court acknowledged that "[i]t is '[t]he risk of prior restraint. . . which is the underlying basis for the special Fourth Amendment protections accorded searches for and seizure of First Amendment materials' " [quoting from *Maryland v. Macon*, 472 U.S. 463, 470 (1985)], and concluded that "[t]hese same concerns render invalid the pre-trial seizure at issue here." *Id.*

⁷ Regarding the Government's assertion that prior restraints are limited to "legal impediments," it is irrelevant that the mass seizures condemned in these cases were imposed pre-trial. The point is that these seizures were condemned even though they were not "legal" barriers to expression. Rather, they were condemned because their actual *operation*

condemned by this Court in *Bantam Books v. Sullivan*, 372 U.S. 58 (1963). In that case, this Court invalidated an informal system of prior restraint whereby prosecutors intimidated book and magazine vendors from carrying publications on a prosecutorial blacklist, even though none of them had ever been found obscene. Again, the restraint there was not "legal," but simply one of informal intimidation. Nonetheless, it constituted an impermissible prior restraint.

These cases illustrate that the Government's attempts to shrink the prior restraint doctrine to only those restraints which impose "legal impediments" is simply untenable in light of this Court's long line of cases holding that government action which imposes insurmountable *practical* impediments (e.g., mass seizures or severe intimidation) may also be prior restraints. This is all, of course, consistent with the command of *Near v. Minnesota*, 283 U.S. 697, 713 (1931), that the validity of a regulatory scheme must be measured by its actual "operation and effect," not by any talismanic labels such as "punishment" or "legal impediment."

The Government's attempt to confine prior restraints to those sanctions which impose purely legal impediments is also inconsistent with the policies which underlie the First Amendment. From the Framers' perspective in adopting the First Amendment, it clearly would be of little moment whether the Government, as here, effected the wholesale destruction of vast quantities of presumptively protected media materials and the total forfeiture of an entire media business, or whether the Government accomplished the same impermissible objective by enjoining all future activity by that media business. The end result is always the same; in both cases, the Government has necessarily made it impossible to engage in future protected expression, simply because

and effect was to remove significant quantities of presumptively protected expressive material from the public. In that regard, their condemnation as prior restraints was compelled by *Near's* holding that whether a sanction is ultimately found unconstitutional requires a careful analysis of its actual "operation and effect . . . in substance." 283 U.S. at 713.

the defendant may have made an error in judgment leading to the commission of a speech offense.

Moreover, in order to support its untenable definitions of prior restraint, the Government has grossly mischaracterized the effect of a RICO forfeiture. It asserts that a forfeiture is somehow constitutionally distinct from an injunction in that a defendant who has suffered forfeiture is free to open his or her business elsewhere (G.B. at 25) and implies that a sufficiently "hardy" defendant would be able to do so. This is absolutely untrue. First, RICO's punishment is as big as its target. There is no such thing as a sufficiently "hardy" defendant who can survive a blanket RICO forfeiture. In each case, regardless of the size of the defendant's enterprise, RICO reaches up and grabs the entirety of it, leaving nothing with which to start over. It could as easily swallow up NBC or Universal Studios as it could a corner newsstand found to have sold two obscene issues of *Playboy Magazine*. Indeed it was originally designed to completely disable the "hardest" of defendants, i.e., members of organized crime. No one has ever suggested that RICO forfeiture is anything less than 100% effective at completely destroying a target's economic base.

Second, it is absolutely untrue that Petitioner could sell his presumptively protected media materials by opening another business at some other location. Not only do the forfeiture laws make any such reopening an economic impossibility, more importantly, part of the forfeiture in this case was the complete destruction of hundreds of thousands of videotapes and magazines, all but seven of which were presumptively constitutionally protected. Because they have been destroyed, none of *those* videotapes or magazines could ever be disseminated by Petitioner at *any* other location. They have simply been suppressed in the most permanent and effective way. Clearly, there is no significant constitutional distinction between the prior restraint impact of an obscenity-predicated injunction and an obscenity-predicated blanket

RICO forfeiture.⁸ Such RICO forfeitures operate precisely like an injunction imposed as "punishment" for an obscenity offense, preventing the defendant from distributing any of the business' *other* constitutionally protected inventory.

The Government's proposed definition of prior restraint is also unsupported by any significant analysis of this Court's four most pertinent prior restraint cases, i.e., *Near v. Minnesota*; *Organization for a Better Austin v. Keefe*, 402 U.S. 415 (1971); *New York Times v. United States*, 403 U.S. 713 (1971); and *Kingsley Books, Inc. v. Brown*, 354 U.S. 436 (1957). As noted above, the Government has avoided any analysis of *Near's* caveat that it was not addressing the "permissible scope" of subsequent punishment and has also ignored the fact that the same injunction condemned in *Near* as a prior restraint would be no less impermissible if imposed as "punishment."

Similarly, the Government has entirely avoided any discussion whatsoever of two of the other very significant prior restraint cases cited by Petitioner, i.e., *Organization for a Better Austin v. Keefe*, and *New York Times v. United States*. The former completely reaffirms *Near*, while *New York Times v. United States* demonstrates the very high level of scrutiny that this Court will give to even the *most limited* of governmental actions challenged as a prior restraint (e.g., an injunction against disseminating *one particular article* believed to constitute a violation of national security). In sharp contrast, the governmental sanction imposed here broadly and indiscriminately destroyed innumerable constitutionally protected materials and has also imposed an insurmountable practical obstacle to Petitioner's businesses' ability to engage in any other presumptively protected expression. The clear contrast between this RICO forfeiture and the governmental sanction

⁸ It is clear from the legislative history that the significance of adding obscenity as a predicate RICO offense was never considered in the normal course of congressional debate. For an excellent discussion of the legislative history of obscenity-predicated RICO and of forfeiture laws in the United States generally, see the brief of Amici Curiae American Library Association, *et al.*

stricken in *New York Times* readily demonstrates why the far more drastic sanction imposed in this case should be invalidated under the stricter *per se* rule of *Near* and *Austin*.

Likewise, the Government ignores this Court's most emphatic description of the essence of a prior restraint, as articulated in both *Near* and *Kingsley Books, Inc. v. Brown*. This Court summarized the essence of *Near's* holding in *Kingsley Books*:

"Minnesota empowered its Courts to enjoin the dissemination of future issues of a publication because its past issues had been found offensive. In the language of Mr. Chief Justice Hughes, 'this is of the essence of censorship.' 283 U.S. at p. 713." 354 U.S. at 445.

In light of the other types of governmental sanctions this Court has also condemned as prior restraints (*e.g.*, mass seizures and licensing laws), it is clear that the language above is not some limited principle that prior restraint doctrine only applies where *injunctive* relief is issued, but applies to *any* governmental sanction imposed on the basis of prior speech violations which necessarily removes from public access other materials not found to be unlawful. In the present case, those materials would be the hundreds of thousands of presumptively protected video tapes, books and magazines which were destroyed, as well as the total dismantling of Petitioner's business, the functional equivalent of an injunction preventing his businesses from any future dissemination of any other presumptively protected materials.

Finally, and of paramount importance, the Government's dangerous assertion that "punishment" can never be a prior restraint will open the door wide to the most egregious abuses by federal, state and local prosecutors. The Government is careful to avoid discussing these ramifications because it no doubt realizes that there would be no way to prevent such wholesale censorship at all levels of government if Government could simply avoid constitutional scrutiny by labeling any and every act of censorship as a "punishment" for some

speech-related infraction. For example, under the Government's constitutional theory, it would have been entirely appropriate in *NAACP v. Alabama*, 377 U.S. 288 (1964), for Alabama to have barred Martin Luther King from leading future marches as punishment for having committed the charged minor violations in previous demonstrations.

The constitutional mode of analysis suggested by the Government is not only in clear conflict with this Court's precedents, but, if adopted, would unquestionably permit the wholesale destruction of any and every media business targeted by hostile federal, state or local officials once that business is found to have committed the most minor of speech violations. The Government's proffered test should be unequivocally repudiated by this Court.

B. The Government Has Totally Misrepresented Petitioner's Definition Of Prior Restraint And Has Based Most Of Its Attack Upon An Argument That Petitioner Does Not Make.

The Government inexplicably asserts that "the rationale of Petitioner's constitutional analysis . . . [is that] the nature of predicate racketeering offenses should have no bearing on the constitutionality of the forfeiture" (G.B. at 15), *i.e.*, that Petitioner's argument is premised on the theory that any wholesale restraint of a media business is unconstitutional, even if the predicate crime is one such as murder or drugs. This is simply absurd.

Petitioner has not only repeatedly stated that RICO forfeiture is unconstitutional only when triggered *exclusively* by speech related offenses, but has also made it clear that the case law upon which he relies for this conclusion requires the same result. Among the numerous cases supporting Petitioner's challenge to RICO forfeiture are *Near*, *Organization for a Better Austin*, *Kingsley Books* and *Arcara v. Cloud Books, Inc.*, 478 U.S. 697 (1986). Clearly the holdings in *Near*, *Organization for a Better Austin* and *Kingsley* have no application whatsoever where the asserted prior restraint

would be imposed based upon non-speech offenses. As this Court summarized the holding of *Near in Kingsley*, the sanction was impermissible because it was *exclusively* based upon the fact that the magazine's "past issues had been found offensive." 354 U.S. at 445. Obviously, the Government is incorrect when it asserts that Petitioner's argument under the prior restraint doctrine necessarily extends to RICO forfeitures based on non-speech violations.

Similarly, in *Arcara v. Cloud Books, Inc.*, this Court made quite clear that there was a bright-line distinction between sanctions imposed for speech violations and those imposed for unlawful non-speech conduct, such as prostitution on the premises of a bookstore. Again, this is simply additional proof that the Government has no basis whatsoever for its wild mischaracterization of Petitioner's argument as requiring that this Court invalidate any RICO forfeiture where a speech business is purchased through the proceeds of racketeering activity unrelated to speech offenses, *e.g.*, drug money.

By so characterizing Petitioner's argument, the Government seeks to avert the heightened standard of scrutiny applicable in First Amendment cases. Yet, *Arcara* makes quite clear that where, as here, the conduct leading to a significant sanction is speech related (in the present case obscenity violations), strict First Amendment standards of scrutiny must apply.⁹

⁹ The Government and/or its amici have alternatively suggested two other bases for avoiding strict First Amendment scrutiny. They are both obviously inapplicable. First, the Government asserts that the lesser standard of review articulated in *United States v. O'Brien*, 391 U.S. 367 (1968), should apply on the theory that "[o]bscenity is not 'conduct with a significant expressive element,' but is expressive activity that falls outside the protection of the First Amendment." (G.B. 25-26, n.10.) This is simply irrelevant. This Court has never suggested that the *O'Brien* test has any application to a prior restraint. Moreover, what is being restrained here is not conduct mixed with speech or conduct mixed with symbolic speech. It is *pure speech*: the innumerable presumptively protected video tapes and magazines which the government destroyed, as well as all other media

The Government has also drastically mischaracterized the facts of this case, describing Petitioner's forfeited assets as the "dishonest gains" (p. 12) of what the district court erroneously described as "an enormous racketeering enterprise" (p. 10). Both of these statements are palpably untrue.

First, the Government has not asserted that the actual proceeds from the seven unlawful predicate RICO offenses proven at trial were anything other than *de minimis*.¹⁰ Yet the value of the property forfeited in this case has been roughly assessed at approximately \$25,000,000.¹¹ Obviously, what has

items Petitioner's businesses would have distributed in the future. *O'Brien* is simply irrelevant in this context.

As another argument for avoiding First Amendment scrutiny, Amicus Curiae Christian Legal Defense suggests that the strict scrutiny inherent in the prior restraint doctrine is inapplicable to sexually explicit expression, whether constitutionally protected or not. However, this Court has consistently held that the prior restraint doctrine applies with full force and effect where sexually explicit expression is involved. See, *e.g.*, *Freedman v. Maryland*, 380 U.S. 734 (1965); *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546 (1975); *Vance v. Universal Amusement Co.*, 445 U.S. 308 (1980); and *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215 (1990). Even outside the area of prior restraint, this Court has consistently rejected the dangerous notion that controversial speech is entitled to less constitutional protection than other expression. Compare, *e.g.*, *R.A.V. v. City of St. Paul*, ___ U.S. ___, 112 S.Ct. 2538 (1992) (affording full constitutional protection to speech involving elements of racial hatred) with *Sable Communications v. F.C.C.*, 492 U.S. 115 (1989) (finding "obscene" telephone messages constitutionally unprotected while affording full constitutional protection to sexually explicit "indecent" messages).

¹⁰ Although the Government does not mention the dollar value of the proceeds of the seven items found obscene at trial, it does cite with approval the holding in *United States v. Pryba*, 900 F.2d 748 (4th Cir. 1990), where the forfeiture of a media business with annual sales of approximately \$2 million "resulted from the seizure of obscene material worth \$105.30." (G.B. at 6.)

¹¹ The Government faults Petitioner for failing "to establish the value of the property in the district court" (G.B. at 10), yet as the only party in possession of the forfeited assets and records of Petitioner's businesses,

been forfeited in this case is not simply "dishonest gains" or "personal property realized through or derived from crime." (G.B. at 12.)

Second, the district court's characterization of Petitioner's business as "an enormous racketeering enterprise," which the Government echoed, is equally misplaced. Because tax offenses are not predicate RICO offenses, the only RICO-related conduct proven at trial was the sale of four obscene magazines and three obscene videotapes over a twenty-year period. This is hardly proof of an "enormous racketeering enterprise." Suppose, for example, that one videotape sold by Blockbuster Video had been found obscene in some local community. Just as it would be entirely inappropriate to refer to Blockbuster Video as "an enormous racketeering enterprise," this characterization of Petitioner's businesses is equally inappropriate. The only evidence at trial was that Petitioner operated numerous businesses over a twenty year period and, in all that time, only seven of the hundreds of thousands of videotapes and magazines which he disseminated were found obscene. The destruction of his entire inventory, as well as the dismantling of all of his businesses, was unquestionably an improper and unconstitutional response.

Finally, the Government asserts that Petitioner's proposed definition of prior restraint is unworkable because the prior restraint impact of a blanket forfeiture is indistinguishable from the impact of a large jail sentence or a high fine. Once again, this is simply untrue. First, unlike jail sentences or high fines (which may or may not cause a restraint on future expression, depending on the extent of the fine and the wherewithal of the defendant), this Court's cases require invalidation under a *per se* test if a sanction is imposed for a prior speech violation *and in every case where the statutory sanction is imposed, it will immediately or inevitably suppress*

only the Government had the ability to make such a showing and it failed to do so. It should not then be heard to object to Petitioner's best estimate as to the value of the forfeited assets. Significantly, the Government has made no estimate of its own.

speech. Such sanctions are invalid *per se* because they are based on prior speech violations and are either directly aimed at suppressing protected expression or will *necessarily cause that result in every case*. Under this test, it is quite clear that a blanket RICO forfeiture is a prior restraint because the total dismantling of a media business is the functional equivalent of an injunction preventing that business from engaging in future presumptively protected activity. The effect of an order dismantling a business is to immediately and inevitably suppress its future expressive rights.

In sharp contrast, jail sentences and high fines *may* have the effect of suppressing speech, but that will not necessarily be the situation *in every case*. Accordingly, they would not be subject to invalidation under the *per se* test of *Near* and *Organization For A Better Austin*. Rather, in a given case or at a certain degree of severity, these punishments might be challenged as impermissible *indirect* prior restraints. Certainly a holding by this Court that RICO forfeiture, as a direct prior restraint, requires invalidation under a *per se* test, would not require it to invalidate any particularly severe jail sentences or high fines that may be challenged in future cases. It is neither necessary nor appropriate for this Court to consider the as-applied test for evaluating *indirect* restraints not present here in order to conclude that the blanket forfeiture and wholesale destruction of hundreds of thousands of media materials which occurred in *this* case is unquestionably a *direct* and *per se* prior restraint of the worst type.

If, as the Government concedes, an *injunction* against future expression based upon prior speech violations is a *per se* prior restraint, then clearly the same must be true of a blanket forfeiture order dismantling an entire media business and destroying all of its media inventory. The complete dismantling of a business necessarily prevents that business from engaging in future presumptively protected speech activities. Similarly, the destruction of all the media inventory of such a business is clearly no less a prior restraint than the mass seizure of unlitigated items condemned by this Court in *Marcus*, *A Quantity of Books*, *Lee Art*, *Roaden* and *Fort Wayne Books*. The blanket forfeiture of Petitioner's businesses should be condemned as an impermissible prior restraint and the forfeiture order of the district court should be vacated.

II

THE GOVERNMENT HAS SIMILARLY FAILED TO PROVIDE ANY CREDIBLE EXPLANATION WHY THE BLANKET FORFEITURE IN THIS CASE IS NOT AN OVERBROAD VIOLATION OF FIRST AMENDMENT RIGHTS.

As Petitioner has consistently stated, the most appropriate disposition of this case would be to hold the blanket forfeiture of Petitioner's businesses a prior restraint which is unconstitutional *per se*. However, it is equally clear that the devastating forfeiture in this case is also invalid as an overbroad sanction for prior speech violations which unduly suppresses future presumptively protected expression, in derogation of both Petitioner's and the public's First Amendment rights.

The Government's response is twofold. First it asserts that the overbreadth doctrine applies only in cases where the underlying criminal proscription sweeps within its scope constitutionally protected expression. However, as Petitioner has clearly pointed out, the overbreadth doctrine is not so limited. In *NAACP v. Alabama*, 377 U.S. 288 (1964), this Court used the First Amendment overbreadth doctrine to invalidate a sanction which prohibited the NAACP from engaging in activities protected by the First Amendment, regardless of whether the triggering conduct was itself protected by the First Amendment.

Second, the Government asserts that the overbreadth doctrine exists exclusively for the purpose of preventing the chilling effect on protected expression which would result if overbroad statutes were not stricken. This is also untrue. Again, in *NAACP v. Alabama*, this Court struck down the overbroad sanction not because it would chill legitimate speech rights, but because it absolutely and directly banned Martin Luther King and the NAACP from engaging in future presumptively protected activities in Alabama. This Court concluded that such a sanction, imposed for a host of alleged unlawful acts (*e.g.*, defamation), was simply too restrictive of

future speech activities to allow it to stand under the First Amendment.

The sole distinction that the Government asserts between *NAACP v. Alabama* and the present case is that "petitioner has not been *enjoined* from continuing his involvement in the adult entertainment business." (G.B. 34, n.17; emphasis added.) It then argues, as in its prior restraint discussion, that the only speech-restrictive sanctions prohibited by the First Amendment are injunctions. However, as previously discussed, a prior restraint is measured by its "operation and effect" (*Near, supra*, 283 U.S. at 713), not by whether it is an injunction. As previously noted, this Court obviously relied on the *de facto* impediments to future expression present in the numerous cases where it characterized mass pre-trial seizures of books and magazines as prior restraints, describing such sanctions as "the most effective restraint possible." *Marcus v. Search Warrants of Property*, 307 U.S. at 736. Accordingly, it is clear from this Court's precedents that *NAACP* cannot be distinguished simply because the restraint in that case took the form of an injunction. Clearly, the wholesale dismantling of Petitioner's businesses was *at least as effective* as an injunction in preventing those businesses from engaging in future presumptively protected speech activities.

For all these reasons, the forfeiture herein is equally invalid when analyzed under a test of First Amendment overbreadth.

III.

THE GOVERNMENT'S POSITION THAT A MULTI-MILLION-DOLLAR IN PERSONAM FORFEITURE FOR OBSCENITY OFFENSES RAISES NO EIGHTH AMENDMENT PROBLEM IGNORES BOTH HISTORY AND THIS COURT'S DOCTRINE OF PROPORTIONALITY.

The Government's opposition to Petitioner's Eighth Amendment argument distorts both Petitioner's position and this Court's decisions. The Government agrees that "RICO forfeiture can be examined under the Eighth Amendment" (G.B. at 35, n.18), but proceeds to argue that a multi-million-

dollar forfeiture of a bookstore, theater, and video chain for an error of judgment regarding the obscenity of seven items is unassailable under the Eighth Amendment – a position which would render this Court's proportionality review utterly meaningless.

In an attempt to avoid Petitioner's analysis of RICO forfeitures as an unprecedented revival of the *in personam* forfeiture closely akin to the long rejected "forfeiture of estate," the Government attempts to equate limitless RICO forfeitures with *in rem* forfeitures (which are not involved here). The Government also attempts to distract the Court from the essential issues in this case by vastly underestimating the value of a business which it has already destroyed in the utmost bad faith, selling off the real property at fire sale prices as low as \$1 and physically destroying its inventory.¹²

The Government does not even address the Petitioner's historical argument that *in personam* forfeitures had fallen into grave disrepute by the time the Framers adopted the Constitution, and were thereafter anathema in American law until revived by the RICO Act. See Brief of Amici Curiae American Library Association, et al., at 5-8; Petitioner's Brief at 43-44. *In personam* forfeitures are clearly disfavored because of their limitless sweep, unlike the *in rem* forfeiture

¹² The Government suggests that Petitioner has "failed to make out a prima facie case that the forfeiture was excessive" (G.B. at 42). This contention is particularly inappropriate given the fact that by its seizure of the relevant businesses and all their records, the Government essentially disabled Petitioner from documenting even the most narrowly-defined cash value of his confiscated businesses. More importantly, the Government has purposefully destroyed the value of these going concerns by selling them off "for parts," not to mention its wanton destruction of hundreds of thousands of media items seized from their retail and warehouse facilities. Having alleged here and in the indictment that Petitioner's businesses "generated millions of dollars in annual revenues," (G.B. at 3), the Government should not now be heard in its artificial attempts to minimize their value. Indeed, whether one values the forfeited property at \$25 million or at a fraction of that amount, a multi-million dollar forfeiture for a few obscene items speaks for itself as a prima facie case of disproportionality.

which narrowly targets contraband or the instrumentalities of a crime. The Government apparently disputes the undeniable fact that RICO forfeitures are *in personam* rather than *in rem*, and then argues that RICO forfeitures are constitutional because some *other* type of forfeiture not involved in this case, i.e., a forfeiture limited to contraband or property actually used to violate the law, might survive Eighth Amendment scrutiny.

As further support for its assertion that RICO forfeitures are *in rem*, the Government continues the fiction which permeates its First Amendment argument: that Petitioner's entire business was somehow rife with illegality, constituting "ill-gotten gains" "acquired or maintained through a pattern of racketeering activity." Although courts have with good reason interpreted the broad provisions of 18 U.S.C. § 1963(a)(1)-(3) to extend to a RICO defendant's entire interest in the "enterprise," there is nothing illegal about most of the property forfeited in this case. Rather, it represents a business which for more than twenty years has engaged in an overwhelmingly legal trade in materials protected by the First Amendment, including materials specifically determined to be non-obscene in this case. It is therefore meaningless for the Government to assert that RICO forfeitures are limited to property "linked to racketeering activity," or "related to illegal conduct" (G.B. at 35, 36). In fact they are unquestionably *in personam* criminal forfeitures of a convicted defendant's property. It is patently false that all the forfeited property was either "used to commit a crime" or "acquired with the proceeds of illegal activity." (G.B. at 39.)

In this case the Government has confiscated a large business solely because of its relationship to a defendant convicted of selling seven obscene items, not because of the business' inherent illegality. This forfeiture is therefore unquestionably of the *in personam* rather than the *in rem* type. As such, it is both historically assailable as a type of punishment the Framers intended to bar, and fatally flawed from a proportionality perspective.

Anomalously, as noted in the First Amendment context, the larger the RICO/obscenity defendant's predominantly

legal business, the *greater* the penalty the forfeiture sanction will exact. This alone should invalidate the sanction here under the excessive fines and cruel and unusual punishment clauses. Yet it is apparently the Government's position that no matter how enormous the forfeiture imposed for an obscenity offense, it is not subject to any meaningful proportionality review because by definitional circularity the defendant has conducted an "enormous racketeering enterprise." Under the Government's approach, then, if CBS or AT&T were convicted of obscenity offenses under RICO (or some similar statute this Court's approval of obscenity-RICO might spawn), its total forfeiture would be all the more palatable and proportional because of the "enormity of the criminal enterprise."

Here as in the First Amendment context, the Government has betrayed the most appalling lack of comprehension of the basic policies and values that inform our Bill of Rights. Its attempts to eviscerate these fundamental tenets of our political culture must be unequivocally rejected.

CONCLUSION

For all the reasons above, the forfeiture order of the district court should be reversed.

December 4, 1992

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1992

FERRIS J. ALEXANDER, SR.,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF *CERTIORARI* TO THE UNITED STATES
COURT OF APPEALS FOR THE EIGHTH CIRCUIT

**BRIEF *AMICUS CURIAE* OF THE AMERICAN CIVIL
LIBERTIES UNION AND MINNESOTA CIVIL LIBERTIES
UNION IN SUPPORT OF PETITIONER**

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INTEREST OF THE AMICI¹

The American Civil Liberties Union (ACLU) is a nationwide, nonpartisan organization with nearly 300,000 members dedicated to the principles of individual liberty embodied in the Constitution. The Minnesota Civil Liberties Union is one of its state affiliates. Since its founding more than 70 years ago, the ACLU has participated in dozens of free speech cases before this Court, either as counsel for one of the litigants or as *amicus curiae*.

This case raises free speech concerns of vital importance. Law enforcement officials around the nation have increasingly relied on RICO and RICO-type statutes to seize and suppress expressive material that is presumptively entitled to constitutional protection. As dramatically illustrated by the government's wholesale destruction of such material during pendency of the appeal in this case, expansive use of RICO forfeiture in the First Amendment context, if allowed by the Court, will result in the destruction and suppression of much constitutionally protected material. In the interests of members of the public who would otherwise have access to such materials, the ACLU respectfully submits this brief *amicus curiae*.

BACKGROUND

This case arises from an episode in the Justice Department's campaign to suppress erotic speech, an effort geared to eliminate not only materials found obscene under the three-part test set forth in *Miller v. California*, 413 U.S. 15 (1973), but constitutionally protected literature and films on sexual themes as well.

¹ Letters of consent to the filing of this brief have been filed with the Clerk pursuant to Rule 37.3.

The Forfeiture at Issue Here

The prosecution in this case obtained convictions based on the transportation and distribution of seven obscene items, four magazines and three videotapes, while at the same time the jury found that six other challenged items constituted protected speech. Having obtained these convictions under the Racketeer Influenced and Corrupt Organizations Act ("RICO"), the government then used RICO's automatic forfeiture provisions to seize petitioner's entire chain of retail bookstores and video stores and his wholesale distribution business, including the entire inventory of presumptively protected books, magazines, and videotapes. After trial, but prior to completion of the appellate process, the government destroyed most of the inventory.

Much of this inventory consisted of items similar to both those the jury found to be non-obscene protected speech and the thousands of books and films that petitioner had sold for years apparently without offending community standards. Nevertheless, upon a finding that petitioner had "engage[d] in the conduct" of an "enterprise" -- *i.e.*, his chain of stores -- "through a pattern of racketeering activity" -- *i.e.*, selling seven obscene items -- the district court ordered forfeiture of petitioner's entire interest in ten stores. The district court acted pursuant to 18 U.S.C. § 1963(a)(2), which requires forfeiture of "any (A) interest in . . . or (D) property or contractual right of any kind affording a source of influence over; any enterprise" affected by the pattern of racketeering.

The court then proceeded to order forfeiture of several additional bookstores, other business and personal assets, and \$8,910,548.10 in cash, bringing the total value of the property forfeited to an estimated \$25 million. The forfeiture was ordered even though there was no evidence presented to the jury nor any finding made by the court concerning the respective portions of the business devoted to the illegal distribution of obscenity and to the dissemination of protected

expression. The court based this additional forfeiture on both 18 U.S.C. § 1963(a)(3), reaching "proceeds" of racketeering, and § 1963(a)(1), covering property "acquired or maintained" in violation of RICO.²

While the petition for rehearing was still pending before the Eighth Circuit, the vast majority of this expressive material -- "three tons of magazines, videotapes and sexual paraphernalia" -- was carted to a garbage processing plant and destroyed. See Steve Brandt, *Confiscated Stimulant is a Blast*

² Both the district court and the Eighth Circuit, in ostensibly enforcing "proceeds" forfeiture, relied upon an erroneous reading of cases holding that the government need not trace the "identical dollars" that the defendant realized from illegal activity. See *United States v. Ginsburg*, 773 F.2d 798, 801 (7th Cir. 1985), *cert. denied*, 475 U.S. 1011 (1986). Both courts overlooked that the government nevertheless must prove the amount illegally acquired, and demonstrate at least a rough correlation to the amount forfeited, *id.*, a burden wholly unmet in this case. It appears that the district court's actual reason for ordering the additional forfeiture was to eliminate petitioner's ability to continue distributing pornography, in service of RICO's purpose of dismantling the corrupt enterprise "root and branch." See *United States v. Alexander*, No. 4-89-85, 1990 U.S. Dist. LEXIS 10466, at *18 (D. Minn. Aug. 10, 1990).

The government, the district court, and the Court of Appeals have all voiced concern that RICO forfeiture in obscenity cases is necessary to prevent use of expressive enterprises as vehicles for money-laundering, relying upon the Fourth Circuit's reasoning in *United States v. Pryba*, 900 F.2d 748, 755 (4th Cir.), *cert. denied*, 111 S. Ct. 305 (1990), that "to follow the [prior restraint] argument would allow criminals to protect their loot by investing it in newspapers, magazines, radio and television stations." On this record, however, that concern is misplaced. Whether and to what extent the forfeiture of protected speech might be justified by the government's interest in preventing money-laundering, this interest cannot justify wholesale forfeiture of materials not derived from ill-gotten gains. We therefore do not address the constitutionality of properly circumscribed forfeiture under § 1963(a)(3) reaching only actual "proceeds" of specific obscenity violations, which would present different issues than the broad-brush forfeiture actually imposed here.

in the Trash, Minn. Star Trib., Oct. 19, 1991, at 1B (cited in Petition for a Writ of Certiorari at 8). The only notice given of the government's plan to destroy these materials was a statement of intent to "dispose of the property in such manner as the Attorney General may direct" and "in accordance with law." Minn. Star Trib., Aug. 19, 1990, at 2N. Had it not been for an unexpected explosion as the "24 anvil-shaped hammers that weigh 170 pounds each and spin at 900 revolutions a minute," Brandt, *supra*, were crushing defendant's inventory, the public would never have become aware of the destruction.

The Government's Campaign to Eradicate Sexually-Oriented Speech

The extraordinarily harsh and disproportionate forfeiture imposed in this case was not an isolated instance of prosecutorial overzealousness, but part of a government plan to suppress a wide range of constitutionally protected, sexually-oriented speech. This plan was formulated in the late 1980s with the creation of a special "National Obscenity Enforcement Unit" ("NOEU") within the Department of Justice.

Some of the history of this campaign is recounted in the recent decision in *United States v. P.H.E., Inc.*, 965 F.2d 848 (10th Cir. 1992). In 1985, the then-United States Attorney for Utah, Brent Ward, wrote to then-Attorney General Edwin Meese to propose "a coordinated, nationwide prosecution strategy against companies that sold obscene materials." *Id.* at 850. Ward urged Meese to create a "'strike force'" that could institute multiple successive or simultaneous prosecutions against major distributors of sexually-oriented films and literature, a strategy that would "'deal a serious blow to the pornography industry'" because it "'would test the limits of pornographers' endurance'" and might lead "'the targeted companies'" to "'curtail their operations and withdraw from

and refrain from entering [certain] markets.'" *Id.* (quoting letter).

In July 1986, the Attorney General's Commission on Pornography (the "Meese Commission") issued its Final Report. The Commission similarly called upon the Attorney General to "create a task force under the direction of a high ranking official, of no less stature than a Deputy Assistant Attorney General, to investigate and prosecute obscenity law violations" and to "attack the obscenity problem in a concerted and organized manner." Attorney General's Commission on Pornography, *Final Report* at 509 (July 1986). The Commission urged aggressive use of available remedies, "particularly those laws providing forfeitures that could literally put many pornographers out of business," *id.* at 464, and further advised: "Forfeiture should be used to uproot the capital of pornography producers and distributors. Used effectively, forfeiture can substantially handicap these businesses." *Id.* at 498.

The Commission recognized that perhaps prosecutors' most effective weapons could be "the stringent forfeiture provisions under RICO," which had recently been amended to apply to obscenity and thus could be used to "virtually eliminate a large scale pornography operation." *Id.* at 519. While the Meese Commission professed to be urging prosecution only with respect to material meeting the legal definition of obscenity, it defined "pornography" to refer to all material that is "predominantly sexually-explicit and intended primarily for the purpose of sexual arousal," *id.* at 229, a definition that encompasses much constitutionally protected expression.³

³ The Meese Commission expressed concerns even with respect to sexually explicit material that was neither violent nor degrading, *id.* at 339 (observing that "it is far from implausible to hypothesize that material depicting sexual activity without marriage, love, commitment, or affection (continued...)

In response to these recommendations, on February 10, 1987, Attorney General Meese created the NOEU, "a special task force within the United States Department of Justice whose mission [is] to spearhead and coordinate the federal government's efforts in the areas of obscenity and child pornography." *PHE, Inc. v. United States Dep't of Justice*, 743 F. Supp. 15, 19 (D.D.C. 1990). Shortly thereafter, the Department of Justice abandoned its long-standing policy of discouraging multiple prosecutions in two or more districts against a single offender, and actually began encouraging such tactics "where the size of the [defendant's] organizational structure suggests that a multiple district prosecution approach . . . will be most effective." 9 *Dep't of Justice Manual* § 9-75.310 (October 1, 1988), *quoted in PHE, Inc.*, 743 F. Supp. at 19. The Department's prosecutor's manual had to be specifically altered for this purpose. *Id.* Thus, although due process forbids government from attempting "to wear [defendants] out by a multitude of cases with accumulated trials," *Hoag v. New Jersey*, 356 U.S. 464, 467 (1958) (citation omitted), the government adopted precisely such a strategy. *United States v. PHE, Inc.*, 965 F.2d at 850.

The prosecutions launched under this new regime demonstrate that the government's purpose is not just to suppress obscenity, but to drive out of the marketplace anyone who

³(...continued)

bears some causal relationship to sexual activity without marriage, love, commitment, or affection"), as well as certain works involving mere nudity. *Id.* at 347-48.

Before issuing its Final Report, the Commission also wrote to businesses selling *Playboy* and *Penthouse* magazines to inform them that "the Commission received testimony alleging that your company is involved in the sale or distribution of pornography" and offering those companies the opportunity "to respond to the allegations" prior to the issuance of the Final Report. *Playboy Enterprises, Inc. v. Meese*, 639 F. Supp. 581, 588 app. A (D.D.C. 1986).

distributes sexually-oriented materials. In *PHE, Inc.*, the district court enjoined the Department of Justice, the NOEU, and other federal prosecutors from bringing multiple indictments, on the basis of plaintiffs' showing of "a substantial likelihood of success on the merits of their claim that defendants' conduct constitutes bad faith calculated to suppress plaintiffs' constitutional rights." 743 F. Supp. at 25. The court based this conclusion on uncontested findings that (1) government prosecutors had harassed plaintiffs' employees; (2) prosecutors had threatened plaintiffs with multi-district federal prosecution unless they agreed "to cease distribution of all sexually-oriented expressive materials nationwide" including "films, magazines, or books containing 'mere nudity' as well as *Playboy* and *Penthouse* magazines and the book *The Joy of Sex*"; (3) prosecutors had acknowledged that they were requiring plaintiffs to "surrender their First Amendment rights"; and (4) prosecutors had expressly stated that to avoid prosecution plaintiffs would have to "discontinue entirely their participation in the business of sexually-oriented visual material, without regard to whether the material was protected by the First Amendment," because "the prosecutors wanted [PHE's principal] 'out of the business.'" *Id.* at 18.⁴

⁴ The same undisputed facts served as the basis for the Tenth Circuit's recent decision that PHE had satisfied its burden of showing that a federal indictment subsequently brought against it in Utah was "the tainted fruit of a prosecutorial attempt to curtail [its] future First Amendment protected speech." 965 F.2d at 860. *See also Freedberg v. United States Dep't of Justice*, 703 F. Supp. 107, 109-13 (D.D.C. 1988) (federal prosecutors enjoined from launching multiple prosecutions confronting distributor of sexually-oriented materials with "annihilation, by attrition if not conviction").

The prosecution of petitioner in this case thus should be viewed in the broader context of the federal government's crusade against sexually explicit speech. No federal RICO obscenity indictment may be brought without the consultation and involvement of the NOEU, whose prosecutors have actively trained and assisted local federal prosecutors in this area. 9 *Department of Justice Manual* § 9-75.001 (1989). The government's tactics in seizing and destroying petitioner's inventory of constitutionally protected material while his appeal was pending is in keeping with the bad-faith techniques condemned in the *PHE* decisions.

Given this background, it is clear that the forfeiture imposed upon petitioner was not merely a content-neutral punishment for selling seven obscene books and videotapes. To the contrary, this prosecution was commenced to drive petitioner out of the business of selling sexually explicit material -- an improper purpose that itself renders the government's actions constitutionally suspect. See *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 67 (1963). As Justice O'Connor has observed: "If . . . a city were to use a nuisance statute as a pretext for closing down a bookstore because it sold indecent books . . . the case would clearly implicate First Amendment concerns and require analysis under the appropriate First Amendment standard of review." *Arcara v. Cloud Books, Inc.*, 478 U.S. 697, 708 (1986).

SUMMARY OF ARGUMENT

The courts below improperly held that First Amendment standards are wholly inapplicable to RICO's remedies simply on the ground that the government has characterized those remedies as "punishment" for petitioner's "racketeering activity." The First Amendment cannot be avoided through the manipulation of labels. To the contrary, this Court has consistently recognized that the suppression of speech de-

mands constitutional scrutiny regardless of the labels that government attaches to its activity.

While the Court in *Fort Wayne Books v. Indiana*, 489 U.S. 46 (1989), upheld the constitutionality of using obscenity violations as the predicate acts for a RICO-style indictment, it explicitly reserved the question of the constitutionality of RICO's remedies in the speech context, *id.* at 60 -- remedies that are different not just in severity but in kind from ordinary criminal sanctions. As this case demonstrates, application of at least certain of RICO's forfeiture provisions in obscenity cases constitutes unconstitutional prior restraint of speech because: (1) the stated purpose of RICO is to incapacitate the offender from committing further violations, and as applied to obscenity RICO operates to allow the government to destroy existing speech materials and prevent future speech on the ground that it may be illegal; and (2) the forfeiture provisions inevitably lead to the direct and complete suppression of protected material.

The application of RICO forfeiture in the First Amendment context is further unconstitutional because of the vast discretion it gives prosecutors to determine whether to unleash RICO, with its incapacitating remedies, or to withhold that weapon because the defendant is a "legitimate" business. This exercise of prosecutorial discretion clearly is guided by the government's view of whether the defendant is otherwise engaged in undesirable, but protected, speech; this is the essence of impermissible censorship.

Finally, the government's destruction of petitioner's presumptively protected materials while the appeal was pending violated both the Constitution and the clear terms of the RICO statute. To treat such material as if it were contraband places the government in the intolerable role of unreviewable censor. The statute can and should be interpreted to avoid such constitutional problems: RICO requires that forfeited materials be disposed of in a "commercially feasible

manner" and with "due provision for the rights of any innocent persons." Simply destroying salable merchandise does not satisfy the "commercially feasible" requirement, and does not constitute due provision for the right of the innocent public to have prompt access to protected expression.

ARGUMENT

I. THE PROTECTIONS OF THE FIRST AMENDMENT MAY NOT BE CIRCUMVENTED BY RE-LABELING OBSCENITY REGULATION AS AN ATTACK ON "RACKETEERING"

Despite the obvious and severe impact of the government's actions in this case upon expressive activity, the Eighth Circuit upheld the application of RICO's draconian remedies as a permissible regulation of "racketeering." Through the use of the "racketeering" rubric, the Court of Appeals would permit what this Court has prohibited for more than half a century: the circumvention of basic First Amendment protections through use of semantic devices to bring laws restricting free speech under the mantle of neutral governmental regulation.

The Court of Appeals reasoned that since "the RICO forfeiture provisions constitute a criminal penalty imposed following a conviction for conducting an enterprise engaged in racketeering activities," such forfeiture cannot raise First Amendment problems. *Alexander v. Thornburgh*, 943 F.2d 825, 834 (8th Cir. 1991), *cert. granted*, 112 S. Ct. 3024 (1992). This conclusion violates the Court's repeated directive that *all* regulation of speech-related activity, even when nominally directed at categories of "unprotected" speech, is subject to First Amendment scrutiny.⁵

⁵ The Court recently reaffirmed this principle in *R.A.V. v. City of St.* (continued...)

The Court of Appeals also ignored this Court's admonition that "in passing upon constitutional questions, the Court has regard to substance and not to mere matters of form, and . . . the statute must be tested by its operation and effect." *Near v. Minnesota*, 283 U.S. 697, 708 (1931). In *Near*, the Court struck down a statute declaring publication of a "malicious, scandalous, and defamatory" periodical to be a nuisance, and providing for the permanent injunction of "such nuisance." *Id.* at 702-03. Despite Minnesota's argument that the injunction entered under the statute was simply a form of business regulation, this Court held that the law must be scrutinized for its impact on future protected speech. "Characterizing the publication as a business, and the business as a nuisance, does not permit an invasion of the constitutional immunity against restraint." *Id.* at 720.

Fifty-eight years later, the Court reaffirmed these principles in *Fort Wayne Books, Inc. v. Indiana*, 489 U.S. 46 (1989), which held that "the State cannot escape the constitutional safeguards of our prior cases by merely recategorizing a pattern of obscenity violations as 'racketeering.'" *Id.* at 67. The Court rejected Indiana's argument that its forfeiture provision, modeled on the federal RICO statute, could be justified "upon the neutral ground that the sequestered property represented assets used and acquired in the course of

⁵(...continued)

Paul, 112 S. Ct. 2538 (1992), which held that government may not apply content-based distinctions even within a category of "unprotected" speech. The Court stressed that language in prior cases suggesting that obscenity, libel, and other such categories are not protected by the First Amendment "must be taken in context" and "are no more literally true than is the occasionally repeated shorthand characterizing obscenity 'as not being speech at all,'" since no category of speech is "entirely invisible to the Constitution." *Id.* at 2543 (citation omitted). Here, of course, the forfeiture order was directed at presumptively protected speech that falls within the First Amendment under any analysis.

racketeering activity." *Id.* at 64. Without reaching the constitutional validity of the ultimate forfeiture remedies embodied in the Indiana statute, the Court held that the pre-conviction seizure of First Amendment materials was subject to constitutional scrutiny: "It is incontestable that these proceedings were begun to put an end to the sale of obscenity at the three bookstores named in the complaint, and hence we are quite sure that the special rules applicable to removing First Amendment materials from circulation are relevant here." *Id.* at 65.

Between *Near* and *Fort Wayne Books*, the Court frequently reaffirmed that labels will not avert First Amendment analysis. See *Fort Wayne Books*, 489 U.S. at 66-67 (citing cases demonstrating that "the way in which a restraint on speech is 'characterized' under State law is of little consequence"). For example, in *Vance v. Universal Amusement Co.*, 445 U.S. 308, 317 (1980) (per curiam), the Court struck down an obscenity injunction under a neutral-sounding "public nuisance" law for failure to provide constitutionally adequate procedures. The fight against racketeering, like the abatement of public nuisances, is a legitimate sphere for the exercise of governmental power. But as the Court held in *Fort Wayne Books*, when the exercise of that power touches areas of presumptively protected expression, the means employed must satisfy First Amendment concerns.

Arcara v. Cloud Books, Inc., 478 U.S. 697 (1986), relied upon by the government and the courts below, actually supports the application of First Amendment analysis in the present case. In *Arcara*, the Court held that heightened First Amendment scrutiny was not required for a padlock sanction imposed upon a bookstore that had permitted prostitution and other illegal sexual activities on its premises. The Court distinguished cases in which the offenses triggering governmental restrictions themselves involved speech-related activity, stressing that "[t]he legislation providing the closure

sanction was directed at unlawful conduct having nothing to do with books or other expressive activity." *Id.* at 707. The Court emphasized that the padlock order applied only to the "physical premises in which respondents happen to sell books," *id.*, and that "the order would impose no restraint at all on the dissemination of particular materials," since any material on the premises could be sold elsewhere. *Id.* at 706 n.2.

Here, by contrast, the Government applies the drastic remedies of RICO not to combat prostitution or other sexual conduct, nor to put a stop to drug-dealing, gun-running, or other crimes having no cognizable speech content, but to regulate presumptively protected speech. Moreover, the remedy is imposed not just against particular premises but directly against books and other materials presumptively within the First Amendment's protections. Following the distinctions drawn in *Arcara*, and applied in *Fort Wayne Books*, both the procedures and remedies of the RICO statute must be scrutinized under the First Amendment.

II. THE APPLICATION OF RICO'S BROAD "ENTERPRISE" FORFEITURE PROVISIONS TO SUPPRESS AND DESTROY BOOKS AND OTHER EXPRESSIVE MATERIALS VIOLATES THE FIRST AMENDMENT

The Court has repeatedly stressed that "the line between speech unconditionally guaranteed and speech which may legitimately be regulated, suppressed, or punished is finely drawn. The separation of legitimate from illegitimate speech calls for . . . sensitive tools." *Speiser v. Randall*, 357 U.S. 513, 525 (1958) (citations omitted). This principle is unquestionably pertinent in the enforcement of laws against obscenity. "[C]onstitutionally protected expression . . . is often

separated from obscenity only by a dim and uncertain line." *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 66 (1963).

RICO is hardly a sensitive tool. It is by design a blunt instrument, which by virtue of its enormous scope and severe penalties has often been criticized even where free speech concerns are not present.⁶ As Justice Stevens observed of the essentially identical Indiana RICO statute, "[it] arms prosecutors not with scalpels to excise obscene portions of an adult bookstore's inventory but with sickles to mow down the entire undesired use. This the First Amendment will not tolerate." *Fort Wayne Books*, 489 U.S. at 85 (Stevens, J., concurring in part and dissenting in part).

A. The Post-Conviction Seizure of Petitioner's Entire Business, Including The Inventory of Presumptively Protected Material, Is An Unconstitutional Prior Restraint

The application of RICO forfeiture in obscenity cases such as this one permits the suppression of vast quantities of materials never adjudicated obscene, and therefore amounts to both the suppression of existing expression and a prior restraint of future protected speech. The wholesale suppression and destruction of materials that have not been found to be obscene or otherwise unprotected is unconstitutional. *Marcus v. Search Warrant*, 367 U.S. 717 (1961). And, of course, "[a]ny system of prior restraints of expression comes

⁶ See, e.g., *H.J., Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229, 251-56 (1989) (Scalia, J., concurring) (criticizing RICO on vagueness grounds); *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 502 (1985) (Marshall, J., dissenting) ("The responsible use of prosecutorial discretion is particularly important with respect to criminal RICO prosecutions . . . given the extremely severe penalties authorized by RICO's criminal provisions.").

to this Court bearing a heavy presumption against its constitutional validity." *Bantam Books*, 372 U.S. at 70.

Under RICO, upon a finding that a defendant has engaged in a "pattern of racketeering activity" a court *must* order, *inter alia*, forfeiture of *all* property acquired or maintained in violation of RICO, and forfeiture of all interests, claims, and property or contractual rights that afford the defendant a source of influence over the enterprise through which the defendant sold or exhibited the obscene materials. 18 U.S.C. § 1963(a)(1) & (2) (together referred to herein as "enterprise" forfeiture). The effect of this provision is to permit prosecutors to run bookstores and movie theaters out of business, and to seize and destroy their assets, including unlimited quantities of expressive materials. Such actions are plainly unconstitutional under *Near v. Minnesota*, 283 U.S. 697 (1931), which held that the state could not ban future disapproved speech by a newspaper based upon a showing that it had engaged in scandalous speech in the past.⁷

The government has argued -- and the district court and Court of Appeals have held -- that this case differs from *Near* because the object of RICO forfeiture is not to restrain future speech but to punish the defendant for having broken the

⁷ Two courts have recently imposed limiting constructions upon forfeiture remedies for speech-related offenses that go beyond mere disgorgement of obscene materials and proceeds from unlawful activity, in order to avoid the constitutional problems noted here. See *Adult Video Ass'n v. Barr*, 960 F.2d 781, 790-92 (9th Cir. 1992) (holding that RICO does not permit forfeiture of "those assets or interests of the defendant invested in legitimate expressive activity"); *United States v. California Publishers Liquidating Corp.*, 778 F. Supp. 1377, 1393-94 (N.D. Tex. 1991) (denying forfeiture beyond actual obscene materials upon conviction under 18 U.S.C. § 1467).

law.⁸ But nothing in *Near* suggests that a state interest in punishment insulates what would otherwise be an unconstitutional prior restraint.

Properly understood, the challenged forfeiture order in this case reflects two of the principal vices of a prior restraint. First, a principal purpose of RICO is to incapacitate the defendant from committing future violations, which in the obscenity context has been taken by the government to include the prevention of future speech that the government thinks may be obscene. This suppressive purpose renders the forfeiture approved in this case an unconstitutional prior restraint.⁹ Second, the forfeiture order was predicated on speech-related conduct, and, once implemented, completely suppressed petitioner's future speech even to the point of destroying presumptively protected expressive material. It thus qualifies as an unconstitutional prior restraint under each of the factors enunciated in *Arcara v. Cloud Books, Inc.*, 478 U.S. 697, 706 n.2 (1986).

⁸ In *United States v. Pryba*, 900 F.2d 748 (4th Cir. 1990), the Fourth Circuit adopted a different argument to distinguish *Near*. While apparently acknowledging the suppressive intent behind application of RICO forfeiture to obscenity, the court found *Near* inapposite for the unsupportable reason that newspapers, in the Fourth Circuit's view, are "more clearly protected by the First Amendment" than are adult bookstores. *Id.* at 754-55.

⁹ Because the government plainly has a purpose of suppressing future speech in applying RICO here, the Court need not decide whether a suppressive purpose is *always* necessary for regulation to constitute an unconstitutional prior restraint.

1. The application of RICO forfeiture to speech materials is intended to prevent future speech that may be illegal by incapacitating the defendant from engaging in any future speech

The forfeiture provision of RICO "was intended to serve all the aims of the RICO statute, namely, to 'punish, deter, incapacitate, and . . . directly to remove the corrupting influence from the channels of commerce.'" *Russello v. United States*, 464 U.S. 16, 27-28 (1983) (quoting 116 Cong. Rec. at 18955 (1970) (remarks of Sen. McClellan)) (emphasis added). In other words, RICO forfeiture is intended to prevent recurrence of the "racketeering activity." See also *United States v. Perholtz*, 842 F.2d 343, 369 (D.C. Cir. 1988), *cert. denied*, 480 U.S. 821 (1988); H.R. Rep. No. 98-1030, 98th Cong., 2d Sess., 198 (1984), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3377 (RICO "was designed to deprive racketeers of the economic power generated by and used to sustain organized criminal activity"). In particular, the automatic enterprise forfeiture provisions of RICO, 18 U.S.C. § 1963(a)(1) and (2), are clearly tailored to the goal of *incapacitating*, rather than merely punishing, the defendant.

When applied to crimes or enterprises that have nothing to do with speech, this goal of incapacitation raises no First Amendment concerns. But employing the incapacitating effect of RICO forfeiture against violations of obscenity laws as predicate acts under RICO poses serious constitutional questions. As Justice Stevens observed in *Fort Wayne Books* (discussing the post-conviction forfeiture issue the majority declined to reach):

A bookstore receiving revenue from sales of obscene books is not the same as a hardware store or pizza parlor funded by loan-sharking proceeds. The presumptive First Amendment protection

accorded the former does not apply either to the predicate offense or to the business use in the latter. Seldom will First Amendment protections have any relevance to the sanctions that might be invoked against an ordinary commercial establishment. Nor will use of [RICO] to rid that type of enterprise of illegal influence, even by closing it, engender suspicion of censorial motive. Prosecutors in such cases desire only to purge the organized-crime taint; they have no interest in deterring the sale of pizzas or hardware. Sexually explicit books and movies, however, are commodities the State does want to exterminate. The [Indiana RICO] scheme promotes such extermination through elimination of the very establishments where sexually explicit speech is disseminated.

489 U.S. at 85 (Stevens, J., concurring in part and dissenting in part).

The Justice Department's use of RICO to suppress even non-obscene sexually-oriented speech (*see pp. 4 - 8, supra*) makes this censorial purpose abundantly clear. But regardless of the motivation of any particular set of prosecutors, the purpose of preventing future racketeering activity -- here, obscenity -- by incapacitating the offender inheres in the structure of the statute itself. Preventing future speech that the state believes will or may turn out to be illegal, before it occurs and without individualized consideration of the suppressed material, is the essence of a prior restraint. RICO's application to obscenity thus suffers the same infirmity as the attempt of the state in *Near* to prevent future illegal speech through an injunction aimed at the more "'efficient repression or suppression of the evils of scandal,'" 283 U.S. at 77 (quoting trial court).

This result cannot be avoided by calling the forfeiture "punishment" any more than First Amendment scrutiny can be

circumvented by defining obscenity as "racketeering." Nor does it matter that the government may be able to express a genuine purpose of "punishing" those that it also seeks to suppress. The ability to do so cannot shield prior restraints from the "heavy presumption against . . . constitutional validity" that they bear. *Bantam Books*, 372 U.S. at 70. A contrary position would eviscerate the prior restraint doctrine, because it is always possible to characterize suppression as punishment. Virtually by definition, when government wishes to suppress an individual's expression it would also be pleased to see the individual punished for the past actions that have demonstrated a propensity for disfavored expression.¹⁰

2. Wholesale RICO forfeiture directly and completely suppresses future protected speech and is therefore unconstitutional

The seizure and subsequent burning of expressive material is an ancient and highly effective method of suppressing disfavored speech; distaste for such practices was a key element behind the framing of the First Amendment. *Marcus*, 367 U.S. at 724-29. As with the pre-trial seizure in *Marcus*, the government's actions in this case unconstitutionally impose "an effective restraint -- indeed the most effective restraint possible," *id.* at 736, of petitioner's right to speak and to choose to bear the risk of the punishment that may ensue should his speech later be adjudicated unprotected. In fact, the measures taken here are even more directly suppressive than those disapproved of in *Marcus*: There speech was only suppressed until its status was adjudicated, while here the

¹⁰ The Minneapolis officials who had been the object of *Near*'s poison pen undoubtedly would have been pleased to see him punished for past calumnies in addition to being enjoined, but characterizing the injunction against future publishing as a punishment would not have altered the result of that case.

material has been irrevocably destroyed and no such adjudication will ever be possible.

By contrast with the measures of direct suppression consistently held unconstitutional, in *Arcara* the Court found that an order temporarily closing a single bookstore would not be a prior restraint for two reasons:

First, the order would impose no restraint at all on the dissemination of particular materials, since respondents are free to carry on their bookselling business at another location, even if such locations are difficult to find. Second, the closure order sought would not be imposed on the basis of an advance determination that the distribution of particular materials is prohibited -- indeed, the imposition of the closure order has nothing to do with any expressive conduct at all.

474 U.S. at 706 n.2. Both factors dictate a finding of unconstitutional prior restraint here.

The forfeiture order proposed by the government, and approved by the district court, effectively drove petitioner from the bookselling business. Unlike the bookseller in *Arcara*, petitioner cannot take his books and tapes to another location for dissemination, because the *expressive material itself* has been destroyed. Thus, this is not a case where a speaker has been told he cannot speak in a particular time, place, or manner. This is a case where the speaker's words have been taken away from him.

In addition, it is impossible to say that the forfeiture ordered in this case "has nothing to do with any expressive conduct at all," *id.*, because the predicate offense justifying the forfeiture in the first place was speech-related. Moreover, as demonstrated above, the very purpose of the RICO remedial scheme is to prevent future "racketeering" -- in this

case, to prevent future speech that might or might not be illegal. Since the government achieved that purpose here by suppressing in advance *all* of petitioner's speech, it has imposed an unconstitutional prior restraint.

B. Application of RICO's Forfeiture Scheme to Expressive Activity Is Further Unconstitutional Because It Gives Prosecutors Unfettered Discretion to Suppress Disfavored Speech

At its core, the First Amendment commands that "Congress shall make no law" that endows government officials with the power to determine who may speak and what they may say. The Constitution instead favors a variety of discourse: "The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth 'out of a multitude of tongues, [rather] than through any kind of authoritative selection.'" *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967). Thus, this Court has insisted that any law that "makes that peaceful enjoyment of freedoms which the Constitution guarantees contingent upon the uncontrolled will of an official . . . is an unconstitutional censorship or prior restraint upon the enjoyment of those freedoms." *Shuttlesworth v. Birmingham*, 394 U.S. 147, 151 (1969).

The availability of RICO's incapacitating enterprise forfeiture remedies for obscenity violations offends this principle by granting prosecutors the unfettered discretion to decide whether to press a RICO charge and dismantle an entire expressive enterprise -- presumably, as here, based on the judgment that even the defendant's protected speech activities are undesirable -- or whether to forgo RICO and pursue only simple obscenity charges.¹¹ The power of this

¹¹ The grant of broad discretion to prosecutors in applying RICO in (continued...)

tool has been recognized by the Justice Department, which has centralized the discretionary authority in order to ensure conformity with the Department's program of suppressing sexually-oriented speech. (See p. 8, *supra*).

The "doctrine forbidding unbridled discretion," *City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 770 (1988), has been elaborated under a number of different First Amendment categories. The Court has, for example, noted "the time-tested knowledge that in the area of free expression a licensing statute placing unbridled discretion in the hands of a government official or agency constitutes a prior restraint and may result in censorship." *Id.* at 757.¹² Elsewhere, the Court has stressed that undue discretion is one of the primary evils characterizing vague laws, *see, e.g., Gentile v. State Bar of Nevada*, 111 S. Ct. 2720, 2732 (1991); *Smith v. Goguen*, 415 U.S. 566, 575 (1974) (invalidating criminal contempt penalty for "flag-misuse": "Statutory language of such a standardless sweep allows policemen [and] prosecutors . . . to pursue their personal predilections"), as well as overbroad laws:

[A] penal statute . . . which does not aim specifically at evils within the allowable area of state

¹¹(...continued)

general was quite deliberate: "[Congress] chose to confer broad statutory authority on the Executive fully expecting that this authority would be used only in cases in which its use was warranted." *Sedima S.P. R.L. v. Imrex Co.*, 473 U.S. 479, 503 (Marshall, J., dissenting) (citing legislative history).

¹² Thus, although in certain limited circumstances a prior restraint may survive the "heavy presumption against its constitutionality," *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 558 (1975), any scheme that places undue discretion in the hands of a government official "will not be tolerated." *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 225 (1990) (opinion of O'Connor, J.).

control but, on the contrary, sweeps within its ambit other activities that in ordinary circumstances constitute an exercise of freedom of speech or of the press . . . readily lends itself to harsh and discriminatory enforcement by local prosecuting officials, against particular groups deemed to merit their displeasure.

Thornhill v. Alabama, 310 U.S. 88, 97-98 (1940) (invalidating criminal penalty for "loitering").

A primary concern is that a law granting undue discretion to suppress speech renders it impossible to review government action for censorial motive. In *City of Lakewood*, for example, the Court discussed this concern in the context of a newsrack licensing scheme:

[T]he absence of express standards makes it difficult to distinguish, "as applied," between a licensor's legitimate denial of a permit and its illegitimate abuse of censorial power. Standards provide the guideposts that check the licensor and allow courts quickly and easily to determine whether the licensor is discriminating against disfavored speech.

486 U.S. at 758.

Here, the danger of unreviewable censorial motive is very real -- and, as demonstrated above (at pp. 4 - 8), not merely hypothetical. The government's easy ability to transform an obscenity prosecution into a RICO case¹³ and to spread the

¹³ Only two "predicate acts" of obscenity distribution are required to make out a RICO indictment. 18 U.S.C. § 1961(5). Although the acts must form a "pattern of racketeering," *see* 18 U.S.C. § 1962, the judge-made requisites of "relationship plus continuity" are so minimal and cryptic as to cause four Justices of this Court to suggest that this "meager (continued...)

book-burning flames from a tiny amount of obscene material to an unlimited quantity of protected speech is an invitation to prosecutions ostensibly predicated on a handful of obscene works but substantially motivated by the desire to suppress the protected works of unpopular speech or speakers, including the non-obscene sexually explicit material that has been targeted by the Justice Department. At a time when adult booksellers, rap musicians, performance artists, museum curators, and others whose works may test the limits of social acceptance are under attack in many communities, the ability of government to label a speaker a "racketeer" and on that basis to seize protected materials and prevent their dissemination is too ominous for the Constitution to allow.

If RICO were applied in an even-handed fashion to any enterprise purveying *any* amount of arguably obscene material, it would seem only a matter of time before a "pattern of racketeering activity" would be found by a jury based on as few as two sales of a controversial novel, risqué film, or sexually explicit popular music recording. The sequel of forfeiture and destruction would automatically follow for all property affording a Time-Warner, a Tower Records, or a B. Dalton corporate entity a "source of influence" over its record label, film studio, or chain of retail outlets. And the vast amount of non-obscene speech thereby seized might well be burned and crushed, as in this case, before an appellate court even had the opportunity to hear the case.

The expected counter-argument -- that such a "parade of horrors" is unlikely to materialize because of prosecutorial discretion not to bring RICO charges against "legitimate" media businesses -- only focuses the constitutional problem.

¹³(...continued)

guidance bodes ill for the day when [a constitutional] challenge is presented." *H.J., Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229, 251-56 (1989) (Scalia, J., concurring).

It is precisely this discretion to declare one purveyor a "legitimate" business to be prosecuted only for individual acts of obscenity and another a "pornographer" to be run out of business that offends the "doctrine forbidding unbridled discretion" by allowing government to act as a censor.

III. NEITHER RICO NOR THE FIRST AMENDMENT PERMITS THE GOVERNMENT, AS UNFETTERED CENSOR, TO BURN BOOKS AND CRUSH VIDEOTAPES THAT HAVE NOT BEEN JUDICIALLY DETERMINED TO BE OBSCENE

The suppressive motive behind petitioner's prosecution was further demonstrated, while this case was before the Eighth Circuit, by a government action that has happily become a rarity in this country: book-burning. But this case is a stark reminder that the burning of books, like wanton searches and seizures, "is not new" in the history of "suppression of objectionable publications." *Marcus v. Search Warrant*, 367 U.S. 717, 724 (1961). The government treated the forfeited expressive materials as if they were contraband despite this Court's declaration that even alleged obscenity may not be so treated. *See id.*, 367 U.S. at 730-31. As a result of this act of summary censorship, much expressive material -- possibly including all copies of some works -- will never reach the public. By burning and crushing the vast majority of petitioner's inventory, when virtually none of those materials had been adjudicated obscene and most were therefore presumptively protected speech, the government violated both the Constitution and the clear language of RICO.

When property is seized following a RICO forfeiture order, the Attorney General must "direct the disposition of the property by sale or other commercially feasible means, making due provision for the rights of any innocent persons." 18 U.S.C. § 1962(f). The government must also "publish notice of the [forfeiture] order and of its intent to dispose of

the property in such manner as the Attorney General may direct." 18 U.S.C. § 1963(l)(1). The pro forma notice provided in this case gave no indication that the government's intended "disposition" was destruction. (See p. 4, *supra*). Thus, no meaningful notice was provided to the public -- "innocent persons" whose right of access to protected speech was severely infringed by the government's unilateral action.

RICO does not permit the government to burn books not adjudicated obscene. Paying a garbage processing plant to destroy three tons of merchandise with demonstrated commercial value is not the "commercially feasible" disposition required by the statute. Assuming, *arguendo*, that RICO forfeiture was appropriate in this case, the government was under a statutory obligation to sell the materials.¹⁴

The government cannot escape its statutory duty by maintaining that sale of the inventory, though "commercially feasible," would be inappropriate because of the sexually explicit nature of the destroyed materials. There is no basis to argue that all of the destroyed materials were obscene, since the district court found that many items were similar in character to the six items found by the jury to be protected speech. And even if the government had believed that all the materials were obscene, it was constitutionally barred from acting on that belief without a prompt adjudication. *Freedman v. Maryland*, 380 U.S. 51, 58-59 (1965). Nor can the book-burning be justified by the government's distaste for non-

¹⁴ The newspaper article that reported the book-burning referred to the government's apparent excuse for this action -- a purported \$5000 monthly fee for storing the forfeited materials. Brandt, *supra*. But such costs exist whenever seized property is maintained, and could be minimized through prompt "commercially feasible" sale.

obscene sexually-oriented speech. Nothing in RICO permits the government to treat such material as contraband.¹⁵

Moreover, such summary treatment constitutes unconstitutional censorship, indistinguishable from the censorship condemned by the Second Circuit in *United States v. Various Articles of Obscene Merchandise*, Schedule No. 1769, 600 F.2d 394 (2d Cir. 1979). In that case, the United States Customs Service intercepted allegedly obscene merchandise arriving by mail from overseas, then sent notices to each addressee advising that the United States had commenced an action for forfeiture and destruction of the merchandise, and advising of the procedure for contesting the action. Not surprisingly (since receipt of obscene materials would likely constitute a crime), the majority of the addressees failed to respond; the government then moved for entry of a default judgment allowing it to destroy the unclaimed merchandise. The Second Circuit found this procedure constitutionally defective, explaining in terms equally applicable to this case:

The practical effect of such a procedure would be to permit the government's administrative seizure and subsequent destruction of books, magazines and films to become an unreviewed act of censorship. As a result, citizens could be prevented from receiving materials which the courts, given the opportunity, would find not obscene. This we will not allow.

¹⁵ If there were any doubt as to whether the government's actions violated the plain language of RICO, the provisions Congress wrote concerning disposition of seized assets should be construed to avoid the constitutional problems discussed herein. See, e.g., *United States v. Thirty-Seven Photographs*, 402 U.S. 363, 371-72 (1971) (construing 19 U.S.C. § 1305, authorizing Customs Service seizure of allegedly obscene material, to require prompt adjudication of obscenity).

600 F.2d at 399-400. The only contrast between this case and *Schedule No. 1769* is that here the government knew that much of the material it consigned to the flames was non-obscene, yet did not inform any party of its intention to destroy the material, and thereby afforded no one the opportunity to object.¹⁶

In sum, once the government took it upon itself to become custodian of presumptively protected sexually-oriented speech, it assumed the further responsibility either to obtain a *prompt* adjudication of its alleged obscenity, as required by *Freedman*, or, failing that, to insure prompt dissemination. "[D]ue provision for the rights of any innocent persons" must include consideration for the right of the innocent public to access to protected expression, for the "right to receive information and ideas, regardless of their social worth, is fundamental to our free society." *Stanley v. Georgia*, 394 U.S. 557, 564 (1969) (citation omitted). If the government deems this to be a cumbersome, awkward, or untoward role, that is all the more reason why it should not have sought forfeiture of these expressive materials in the first instance.

¹⁶ In an analogous procedural situation, the Fourth Circuit held it improper to stay pending appeal an order to release magazines found by the district court not to be obscene, stating:

Marcus v. Search Warrant . . . and A Quantity of Books v. Kansas, 378 U.S. 205 (1964) . . . emphasize that the determinative factor insofar as the validity of censorship procedures is concerned is whether or not adequate safeguards are provided to insure prompt dissemination of publications which have not been judicially determined to be obscene.

United States v. Reliable Sales Company, 376 F.2d 803, 805 (4th Cir. 1967).

CONCLUSION

The judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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Dated: August 1992

IN THE
Supreme Court of the United States

OCTOBER TERM, 1992

FERRIS J. ALEXANDER,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE EIGHTH CIRCUIT

**BRIEF OF AMERICAN BOOKSELLERS
FOUNDATION FOR FREE EXPRESSION,
COUNCIL FOR PERIODICAL
DISTRIBUTORS ASSOCIATIONS,
INTERNATIONAL PERIODICAL
DISTRIBUTORS ASSOCIATION, INC.,
MAGAZINE PUBLISHERS OF AMERICA, INC.,
NATIONAL ASSOCIATION OF COLLEGE STORES, INC.,
PERIODICAL AND BOOK ASSOCIATION
OF AMERICA, INC.,
AND RECORDING INDUSTRY ASSOCIATION
OF AMERICA, INC.
AS AMICI CURIAE IN SUPPORT OF PETITIONER**

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No. 91-1526

IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

FERRIS J. ALEXANDER,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR
THE EIGHTH CIRCUIT

**BRIEF OF AMERICAN BOOKSELLERS
FOUNDATION FOR FREE EXPRESSION,
COUNCIL FOR PERIODICAL
DISTRIBUTORS ASSOCIATIONS,
INTERNATIONAL PERIODICAL
DISTRIBUTORS ASSOCIATION, INC.,
MAGAZINE PUBLISHERS OF AMERICA, INC.,
NATIONAL ASSOCIATION OF COLLEGE STORES, INC.,
PERIODICAL AND BOOK ASSOCIATION
OF AMERICA, INC.,
AND RECORDING INDUSTRY ASSOCIATION
OF AMERICA, INC.
AS AMICI CURIAE IN SUPPORT OF PETITIONER**

STATEMENT

The American Booksellers Foundation for Free Expression, the Council for Periodical Distributors Associations, the International Periodical Distributors Association, Inc., the Magazine Publishers of America, Inc., the National Association of College Stores, Inc., the Periodical and Book Association of America, Inc., and the Recording Industry Association of America, Inc. (collectively, the "*amici*") submit this joint brief urging reversal of the decision below. This brief is submitted upon the written consents of counsel to both petitioner and respondent, which are submitted herewith.

THE AMICI

The *amici*'s members publish, produce, distribute and sell books, magazines, films, videotapes, recordings and other printed, recorded and filmed materials of all types, including those which are scholarly, literary, scientific and entertaining. As mainstream distributors and booksellers who distribute and sell popular, literary, scientific and scholarly books, periodicals and recordings, *amici*'s members have a significant interest in the resolution of the issue before the Court. *Amici*'s members do not own what are commonly referred to as "adult" retail stores; nor do they distribute the "adult" materials which are generally found in such stores. *Amici*'s members do, however, distribute and sell mainstream materials which, while not obscene, contain sexually explicit matter or other matter that certain persons may find objectionable.

The American Booksellers Foundation for Free Expression ("ABFFE") was organized in 1990. The purpose of ABFFE is to inform and educate booksellers, other members of the book industry and the public about the dangers of censorship and to promote and protect the free expression of ideas, particularly freedom in the choice of reading material.

The Council for Periodical Distributors Associations is the national trade association for approximately 400 independent local wholesale distributors who distribute over ninety-five percent of all magazines, comic books, paperback books and newspapers in every state of the United States.

The International Periodical Distributors Association, Inc. is the trade association for the vast majority of national periodical distributors engaged in the business of distributing or arranging for the distribution of paperback books and periodicals to wholesalers throughout the United States for ultimate distribution to retailers and the public.

The Magazine Publishers of America ("MPA") is a trade association for the consumer magazine industry. MPA was organized in 1919 and has a membership of approximately 200 publishers, representing almost 800 general interest consumer magazines, ranging from journals of literature to special interest publications to multi-million circulation publications.

The National Association of College Stores, Inc. is a trade association composed of approximately 2,850 college stores located throughout the United States.

The Recording Industry Association of America, Inc. ("RIAA") is a not-for-profit corporation, whose member companies create and produce sound recordings and manufacture and distribute phonorecords. The members of the RIAA produce at least ninety-five percent of the authorized phonorecords manufactured and sold in the United States, including longplaying records, cassette tapes, and compact discs. The RIAA and its members have a continuing commitment to preserving the freedom of artists and producers to create and distribute recorded musical works of interest to all segments of the public.

INTEREST OF THE AMICI AND SUMMARY OF ARGUMENT

The interest of *amici* reflects their continuing interest in the decisions of this Court involving the balancing of First Amendment rights and restrictions on materials with sexual content. *Amici*'s brief will demonstrate how the legal principles involved in this case, and in particular the spectre of forfeiture of their entire businesses, would impact upon those who produce, distribute, show and sell books, periodicals, videos and recordings that are not obscene.

Although the case *sub judice* involves "adult" establishments, forfeiture under the Racketeer Influenced Corrupt Organizations Act ("RICO"), as upheld by the Eighth Circuit, is by no means limited to businesses that deal primarily or exclusively in sexually explicit materials. See *Alexander v. Thornburgh*, 943 F.2d 825, 829 (8th Cir. 1991). In fact, the Eighth Circuit authorized seizure of thirteen entire stores, including massive seizure and destruction of printed materials and videotapes, without any attempt to distinguish between obscene and First Amendment protected materials. Everything was seized and destroyed. The threat of "extermination" of one's business obviously chills the exercise of First Amendment rights even by *amici*, who are mainstream retailers, distributors and publishers, not dealers in obscenity. The general public's First Amendment rights are also impaired when First Amendment enterprises they frequent may be closed, and the First Amendment protected materials they seek are unavailable or, even worse, destroyed.

The concern of legitimate businesses that RICO or the mere threat of its application will be used as a pretext to curtail or censor protected speech is not unwarranted. There has been rising agitation directed against booksellers, other retailers, publishers and distributors selling First Amendment protected

materials. The recordings of 2 Live Crew and Ice T, various Madonna videos, Robert Mapplethorpe books and photographs, Bret Easton Ellis' *American Psycho* and Salman Rushdie's *Satanic Verses*, all of which are carried by mainstream firms such as *amici*, have recently been boycotted and subjected to governmental or public attack.

These are but a few troubling recent examples, and there are more. The U.S. Department of Justice initiated multiple obscenity prosecutions to harass a national distributor and force him "out of the business" so that he could no longer distribute concededly First Amendment protected sexually frank materials. *U.S. v. P.H.E., Inc.*, 965 F.2d 848, 858 (10th Cir. 1992). In Alabama, the District Attorney of the City of Montgomery embarked on an unlawful campaign to coerce bookstore and newsstand owners from carrying any future issues of periodicals which he deemed objectionable, but that were adjudged to be protected by the First Amendment. See *Council for Periodical Distributors Ass'n v. Evans*, 642 F. Supp. 552, 565 (M.D. Ala. 1986), *aff'd in part and vacated in part*, 827 F.2d 1483 (11th Cir. 1987).

The Attorney General's Commission on Pornography ("Commission") in its July 1986 report not only endorsed broad new law enforcement initiatives, but also encouraged "private" censorship efforts as a "coercive force" to "control" the availability of materials concededly protected by the First Amendment. Attorney General's Commission on Pornography, *Final Report*, 421-23 (July 1986).

In fact, in furtherance of its goals, the Commission listed as one of its recommendations that state legislatures enact RICO statutes which have obscenity offenses as predicate acts, because "RICO provides an effective means to substantially

eliminate obscenity businesses.” *Id.* at 435, 498.¹ Although the Commission did not say so, RICO also provides an effective means to coerce legitimate businesses into refraining from stocking or distributing First Amendment protected material which may not meet with the approval of a faction in a community and to back up this coercion with the threat of forfeiture of any legitimate business that inadvertently crosses the gray line between what is obscene and what is not.

The spectre of the seizure of one’s business — whether it be an individual’s bookstore constituting all of one’s individual assets, or the national assets of a large publishing house or chain of retail stores — as the result of as few as two inadvertent steps over the very gray line between what might be found obscene in some communities and what might not be, is so overwhelming and draconian that it understandably frightens the members of each *amici* before this Court.

Nor is this fear of seizure unwarranted. The case now before this Court was based on obscenity determinations for only seven items. *Alexander*, 943 F.2d at 829. Despite the small

¹ In addition to the federal RICO forfeiture provisions directly at issue here, at least fourteen states have their own RICO or similar forfeiture provisions, based on obscenity predicate acts. *See e.g.* Ariz. Rev. Stat. Ann. § 13-2301 *et seq.* (West Supp. 1991); Colo. Rev. Stat. Ann. §§ 18-17-103(5)(b)(VI), -105(1)(b), -106(2) (West Supp. 1991); Conn. Gen. Stat. §§ 53-394, 53-397 (Supp. 1991); Del. Code §§ 1502(9)(a)(7), 1504(b), 1505(b) (Supp. 1991); Fla. Stat. Ann. §§ 895.02(1)(a)(29), 895.05(2)(a) (West Supp. 1991); Ga. Code Ann. §§ 16-14-3(9)(A)(xii), 16-14-6(a)(5), 16-14-7(a) (Supp. 1991); Idaho Stat. Ann. §§ 18-7803(a)(8), 18-1704(f) (Supp. 1991); Ind. Code Ann. §§ 34-45-6-1(2)(4), 34-4-30.5-3 (West Supp. 1991); Nev. Rev. Stat. §§ 207.420, 207.460 (Michie 1991); N.J. Stat. Ann. §§ 2C:41-1(e), 2C:41-3, 2C:41-4(a)(9) (West Supp. 1991); N.C. Gen. Stat. §§ 75-D-3(c)(2), 75-8 (Supp. 1991); Okl. St. Ann. §§ 1402(10)(v), 1405(A) (1991); Wash. Stat. Ann. §§ 9A.82.010(14)(s), 9A.82.100(4)(f) (1991); Wis. Stat. Ann. §§ 946.82(4), 946.86(1), 946.87(2)(a) (1991).

number of obscenity violations, thirteen book and video stores were seized, *id.*, and over three tons of inventory were burned or crushed. *Minneapolis Star Tribune*, October 19, 1991 at 1B. Unlike this case, which proceeded to judgment, defendants in other cases may settle before trial and surrender their First Amendment rights, coerced by the possibility of a RICO forfeiture penalty.

A long line of cases of this Court protects the members of *amici* from such fear, coercion and surrender of their First Amendment rights. The prior restraint doctrine, as applied from *Near v. Minnesota*, 283 U.S. 697 (1931), through *Vance v. Universal Amusement Co.*, 445 U.S. 308 (1980), to date, prevents the forfeiture of speech businesses and presumptively protected materials except for material found obscene located in the jurisdiction in which they were found obscene, and the direct proceeds thereof. The forfeiture provisions of RICO produce precisely the evil *Near* and its progeny prohibit — government cannot suppress future, presumptively protected speech based on a finding of or “nexus” to present or past undesirable speech. *See Vance*, 445 U.S. at 311 n.3. *Compare Alexander*, 943 F.2d at 833.

The talismanic lexicon or characterization of RICO does not overcome the protections of the First Amendment and the prior restraint doctrine. Neither labeling the forfeiture a criminal penalty nor denominating a bookstore, publisher or other speech business a “criminal enterprise” changes the impact and application of this significant, longstanding rule of constitutional law against prior restraints. Unless the Court reaffirms the existing doctrine relating to prior restraints, and applies it to forfeiture, the fears of *amici*’s members will be justified.

Further, RICO forfeiture, in its broadest sweep, has an unconstitutional chilling effect on each member of *amici*. Constitutionally protected expression is “often separated from obscenity only by a dim and uncertain line.” *Bantam Books, Inc.*

v. *Sullivan*, 372 U.S. 58, 66 (1963). "RICO penalties for obscenity . . . intimidate not just the porn-shop owner, but also the general bookseller who has been the traditional seller of new books such as *Ulysses*." *FW/PBS, Inc. v. Dallas*, 493 U.S. 215, 252 (1990) (Scalia, J.) (concurring and dissenting).

RICO's forfeiture provisions can survive only to the extent they comport with the First Amendment. The current breadth of RICO's forfeiture provision cannot pass constitutional muster when applied to a speech business. As the Ninth Circuit has recently concluded, tailoring the scope of forfeiture to prevent forfeiture or non-destruction of presumptively protected expressive material "acknowledges that in obscenity cases, unlike traditional RICO prosecutions, a countervailing concern for protecting the public's right to receive, as well as the defendant's right to engage in, non-obscene speech demands a more delicate approach to forfeitures." *Adult Video Ass'n v. Barr*, 1992 U.S. App. LEXIS 13786, No. 90-55252, slip op. at 6838 (9th Cir. June 18, 1992) (narrowing RICO's forfeiture provisions).

ARGUMENT

I. FORFEITURE OF AN ENTIRE SPEECH BUSINESS, INCLUDING PROTECTED MATERIALS AND THE MEANS TO ENGAGE IN SPEECH, IS AN UNCONSTITUTIONAL PRIOR RESTRAINT

The federal RICO statute provides after conviction for forfeiture by defendant of any "enterprise which the person has established, operated, controlled, conducted, or participated in the conduct of in violation of, [RICO]; and . . . any property constituting, or derived from, any proceeds which the person obtained, directly or indirectly, from racketeering activity." 18 U.S.C. § 1963(a). Forfeiture is mandatory upon conviction. *Id.*

It is the clearly expressed intent² and obvious effect of the RICO forfeiture provision, after two specific findings of prohibited unprotected expression, to cause forfeiture of the entire business enterprise, wherever located, in which the violations were committed with the destruction of all the constitutionally protected material therein and the seizure of the means of speech.

Amici's members range in size from small local retailers to large regional or national businesses. To the best of their knowledge, they neither create nor distribute material that is obscene. However, obscenity is determined based on local community standards. *Miller v. California*, 413 U.S. 15 (1973), and the dividing line between protected and unprotected speech may be "dim and uncertain." *Bantam Books*, 372 U.S. at 66.

The draconian effects of RICO, and the potential for massive censorship attempts, are not the idle fears of *amici's* members. The court below affirmed forfeiture of thirteen retail establishments from a business that during over 20 years of existence sold just four magazines and three videotapes that were later adjudicated to be obscene. *Alexander*, 943 F.2d at 832. The federal marshal's office in Minneapolis trucked three tons of magazines, videotapes and other inventory from Alexander's thirteen retail establishment to a garbage processing plant where the magazines were burned and the videotapes crushed. *Minneapolis Star Tribune*, October 19, 1991 at 1B. This mass destruction, on its face, suggests a pretextual use of RICO to unlawfully censor otherwise protected sexually explicit materials. See *Arcara v. Cloud Books, Inc.*, 478 U.S. 697, 708

² See *United States v. Turkette*, 452 U.S. 576, 591 n.13 (1981) (RICO forfeiture is designed to remove the influence of a convicted RICO defendant "from legitimate business by attacking its property interest" and by removing it "from control of legitimate businesses which have been acquired or operated by unlawful racketeering methods." (quoting 116 Cong. Record 602 (1970) remarks of Sen. Hruska)).

(1986) (O'Connor, J., concurring) (pretextual use of a statute to close a bookstore raises First Amendment concerns).³

This seizure of presumptively protected speech and the instrumentalities of speech to prevent future speech violations is an unconstitutional prior restraint. Speech is presumed constitutionally protected unless and until found otherwise in an adversarial judicial proceeding. *E.g.*, *Fort Wayne Books, Inc. v. Indiana*, 489 U.S. 46 (1989). Except in extraordinary circumstances not applicable here, government may not restrain speech prior to a judicial determination that the particular speech in question is constitutionally unprotected. *Bantam Books, Inc.*, 372 U.S. at 70 ("Any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity."). This constitutional prohibition against "prior restraints" on speech is an elementary principle of First Amendment law.

In the core case of *Near v. Minnesota*, 283 U.S. 697 (1931), the trial court found several issues of a newspaper to be "malicious, scandalous, and defamatory." Applying a Minnesota law, the trial court enjoined the publishers from disseminating other "malicious, scandalous, or defamatory" issues in the future. *Id.* at 706. This Court held the trial court's injunction unconstitutional as an impermissible prior restraint against future publication, although Minnesota could still impose criminal punishment for the offending issues. "[I]n *Near* the Supreme Court condemned prior restraints prohibiting future expression that may fall within the purview of the First Amend-

³ If concerned ever so slightly with the public fisc or the public's right of access to protected materials with sexually explicit content, the government could have sold Alexander's seemingly lucrative businesses, which generated substantial income, and which obviously enjoyed the demand of at least a considerable portion of the reading public. See *Alexander*, 943 F.2d at 829 (finding \$8.9 million in proceeds from Alexander's communication businesses for the years 1985 through 1988).

ment where such restraint is based only on a finding of unprotected present conduct." *Gayety Theatres, Inc. v. City of Miami*, 719 F.2d 1550, 1551 (11th Cir. 1983) (per curiam) (affirming on the basis of district court's opinion).

Since the decision in *Near*, numerous courts have struck down statutes that permit the closure or "padlocking" of a bookstore or other speech enterprise based on a finding that the enterprise had engaged in obscene or otherwise unprotected speech in the past.⁴ These courts have invoked the prior restraint doctrine because padlocking a bookstore is the equivalent of enjoining it from selling presumptively protected books in the future.⁵ Likewise, seizing and destroying a

⁴ *E.g.*, *People v. Sequoia Books, Inc.*, 127 Ill. 2d 271, 537 N.E.2d 302 (1989), *cert. denied*, 493 U.S. 1042 (1990); *Minot v. Central Ave. News Inc.*, 308 N.W.2d 851 (N.D.), *appeal dismissed*, 454 U.S. 1117 (1981); *People v. Projection Room Theater*, 17 Cal. 3d 42, 130 Cal. Rptr. 328, 337, 550 P.2d 600, 609, *cert. denied sub nom.*, *VanDeKamp v. Projection Room Theatre*, 429 U.S. 922 (1976); *General Corp. v. State*, 294 Ala. 657, 320 So. 2d 668, 675 (1975), *cert. denied sub nom.*, *Sweeton v. General Corp.*, 425 U.S. 904 (1976); *State v. A Motion Picture Entitled "The Bet"*, 219 Kan. 64, 547 P.2d 760, 769-771 (1976); *Sanders v. State*, 231 Ga. 608, 203 S.E.2d 153, 157 (1974); *Gulf States Theatres, Inc. v. Richardson*, 287 So. 2d 480, 490-492 (La. 1973). *Cf. Gayety Theatres, Inc. v. City of Miami*, 719 F.2d 1550 (11th Cir. 1983) (revocation of business license); *Genusa v. City of Peoria*, 619 F.2d 1203 (7th Cir. 1980) (same); *Cornflower Entertainment, Inc. v. Salt Lake City Corp.*, 485 F. Supp. 777 (D. Utah 1980) (same).

⁵ See *General Corp.*, 320 So. 2d at 675. ("The padlocking of [a speech enterprise] for one-year constitutes prior restraint at its worst and is patently unconstitutional." (citation omitted)); *Gulf States Theatres, Inc.*, 287 So. 2d at 491-92. ("[U]nder our statute there can be no expression of any kind — good or bad — emanating from the premises or from the devices of the premises for a period of one year. This is the very essence of the prior restraint condemned by Blackstone, by our Bill of Rights, and by our jurisprudence.")

business is the functional equivalent of padlocking it.⁶ In either case the business no longer can offer protected materials to the public.⁷

The flaw in the RICO forfeiture provisions at issue here is no different than the prior restraints invalidated in *Near* and its progeny:

In . . . [these] cases the state made the mistake of prohibiting future conduct after a finding of undesirable present conduct. When that future conduct may be protected by the first amendment, the whole system must fail because the dividing line between protected and unprotected speech may be "dim and uncertain." *Bantam Books v. Sullivan* [cite omitted]. The separation of these forms of speech calls for "sensitive tools," [cite omitted].

Vance v. Universal Amusement Co., 445 U.S. 308, 311 n.3 (1980). The sensitivity that this Court has demanded in protecting First Amendment rights is hardly evidenced by the conclusion of the court below that separating obscene and protected materials was simply unnecessary so long as there was some undefined, unquantified "nexus" between Alexander's "rack-

⁶ See *Marcus v. Search Warrant of Property*, 367 U.S. 717, 731-33 (1961) (invalidating as an impermissible prior restraint the large scale confiscation of expressive materials).

⁷ *Arcara v. Cloud Books, Inc.*, 478 U.S. 697 (1986), is not inconsistent with this position. The act precipitating padlocking under the nuisance law at issue in *Arcara* was not in any way related to speech, and therefore the resulting restriction on First Amendment activities was not subject to First Amendment scrutiny. (478 U.S. at 706.) Further, the case did not, for example, involve padlocking other locations at which prostitution had not occurred.

eteering activity" and the three tons of presumptively protected material burned. See *Alexander*, 943 F.2d at 833.

In *United States v. California Publishers Liquidating Corporation*, 778 F. Supp. 1377 (N.D. Tex. 1991), the district court for the Northern District of Texas, applying discretionary obscenity forfeiture standards under the provisions of 18 U.S.C. § 1467 (forfeiture provision of federal obscenity statute) to facts similar to those in the case *sub judice*, found that forfeiture of an entire speech business would be an unconstitutional prior restraint:

Forfeiture under these circumstances of truly *de minimis* use of the properties for the commission of the [obscenity] offenses simply serves no legitimate end; that is, no end other than destroying legal business enterprises simply because their stock in trade is sexually related materials.

Id. at 1389.

. . . [T]he Government's requested forfeiture of Great Western's printing facility is subject to close First Amendment analysis and likely would, if granted, constitute an impermissible prior restraint of expression under *Near v. Minnesota* and its progeny.

Id. at 1394.

Notwithstanding *Near* and its progeny, and the clear equivalency in impact among injunction, padlocking and seizure, in this case the Eighth Circuit appropriated the simplistic and mistaken holding of *United States v. Pryba*, 900 F.2d 748 (4th Cir.), *cert. denied*, 111 S. Ct. 305 (1990), that because several items of expressive materials were found to be obscene in one community, protected expressive materials can be seized

and destroyed without any implication of First Amendment protections so long as RICO's post-conviction procedures are followed.

The forfeiture of non-obscene books, magazines and videotapes, after a conviction of racketeering involving the sale of obscene goods and after the jury has determined that the forfeited materials were acquired or maintained in violation of 18 U.S.C. § 1962 and afforded the . . . [defendants] a source of influence over the racketeering enterprise, does not violate the First Amendment. The fact that some of the materials forfeited are not obscene does not protect them from forfeiture when the procedures established by RICO are followed, as they were in the present case.

Alexander, 943 F.2d at 833 (quoting *Pryba*, 900 F.2d at 756).

Neither *Pryba* nor the decision below satisfies the searching analysis this Court requires when the exercise of First Amendment protected activities is threatened. Both *Pryba* and the court below mistakenly concluded that, so long as some undefined, unquantified "nexus" was established between defendant's racketeering activity and the presumptively protected materials forfeited, no further inquiry or protection need be afforded to accommodate First Amendment rights. *Alexander*, 943 F.2d at 833, quoting *Pryba*, 900 F.2d at 755. The result, however, is precisely the evil *Near* and its progeny forbid: government cannot stifle future presumptively protected speech based on a finding of or "nexus" to present or past undesirable speech. See *Vance*, 445 U.S. 311 n.3. Government cannot suppress one expression simply because of its connection to another that was found unlawful. There can be no censorship by association.

Further, this Court has made it clear that the question of whether a statute operates as a prior restraint must be determined not through formalistic analysis, but through a realistic inquiry into the actual effects of the statute on protected expressive activity. See *Fort Wayne Books, Inc.*, 489 U.S. 46, 109 S. Ct. at 929 (1989) ("this Court has recognized that the way in which a restraint on speech is 'characterized' under State law is of little consequence."). As stated in *Near*, "in passing upon constitutional questions the court has regard to substance and not to mere matters of form . . . ; in accordance with familiar principles, the statute must be tested by its operation and effect." *Near*, 283 U.S. at 708. As this Court held in *Organization For A Better Austin v. Keefe*, a prior restraint exists where "the injunction operates, not to redress alleged private wrongs, but to suppress, on the basis of previous publications, distribution of literature. . . ." 402 U.S. 415, 418-19 (1971).

The plain effect of the forfeiture provisions is to restrain, and indeed destroy, further expression because of the unlawful content of prior expression. The court below avoided First Amendment analysis by characterizing the non-obscene seized books, periodicals and videotapes as proceeds from a "criminal enterprise" acquired through "participating in a racketeering activity" indistinguishable from and entitled to no greater protection than proceeds from drugs, gambling equipment or other contraband. No such easy and facile recharacterization can alter the fact that the statute's seizure and forfeiture provisions create the substantive harm that the prior restraint doctrine aims to prevent — the suppression of protected expressive materials which have not been adjudged obscene, and the seizure of the instrumentalities of expression, all as a consequence of prior speech. Labelling such expression as "racketeering" can no more strip away First Amendment protection than did labelling speech or speakers as "Nazi" (*Collin v. Smith*, 578 F.2d 1197 (7th Cir.), cert. denied, 439 U.S. 916 (1978)); "Communist" (*DeJonge v. Oregon*, 299 U.S. 353 (1937)); anti-Semitic (*Near v. Minnesota*, supra); or

"subordinators of women" (*American Booksellers Ass'n*, 774 F.2d 323 (7th Cir. 1985), *aff'd*, 475 U.S. 1001 (1986)).

Nor is this case similar to the situation cited in *Pryba*, 900 F.2d at 755, when a defendant "launders" illegal drug moneys by purchasing a newspaper or book publisher and then claims First Amendment protection against forfeiture.⁸ Here, instead, the speech business is sought to be destroyed for its speech activities, and expression, unlike proceeds from drugs, is entitled to First Amendment protection.

The Solicitor General has suggested that the First Amendment is in no way implicated because forfeiture is merely another mode of criminal punishment, that the protected materials and business seized and destroyed had less monetary value than the possible fine, and that therefore the prior restraint argument is without merit. These arguments neglect the unambiguous teaching of *Near* that courts must focus on realities, not labels. *See Near*, 283 U.S. at 708. Denominating seizure and destruction of protected speech as a criminal penalty does not alter these realities. In the case of a fine, the protected speech and communicative business can be sold to another and continue its protected First Amendment activities; not so when it has been seized and destroyed, burned and crushed. Calling the padlocking in *Vance* and in the cases cited in footnote 4 a criminal penalty would not have changed the result in those cases. Nor should it here.

Applying the strictures of *Near*, courts must also look to the "operation and effect" of the challenged statute. Criminal penalties such as fines or imprisonment are the traditional price one must pay for past wrongdoing. They are imposed primarily

⁸ Even if a First Amendment enterprise were purchased with "laundered" drug money, we submit that the enterprise or materials may not be destroyed, although perhaps it could be forfeited.

to punish, deter, exact retribution and rehabilitate, not to prevent and restrain future expression. Their impact on future expression is incidental to these legitimate goals. The operation and effect of the forfeiture — and, more precisely, its intent — is to destroy a protected communication business as a penalty for a relatively few speech related criminal acts.⁹ Speak no more, that is the unconstitutional operation and effect of the law. Forfeiture is as unconstitutional as padlocking or injunctions. This Court should so hold.

II.

RICO FORFEITURE IN ITS BROADEST SWEEP HAS AN UNCONSTITUTIONAL CHILLING EFFECT

While the RICO statute's forfeiture penalties clearly operate as an unconstitutional prior restraint when applied to speech businesses, equally ominous and pervasive is the chilling effect that the mere threat these draconian penalties have on protected First Amendment activities. Retailers, distributors and publishers will avoid a provocative publication or movie that may be viewed by some as treading too close to the obscenity threshold because a simple miscalculation could lead to the forfeiture of one's business. The threat to First Amendment protections is always especially acute where questions of obscenity statutes are involved because, as this Court has itself acknowledged, there is no bright line guide for what is protected and what is not. *Bantam Books, Inc.*, 372 U.S. at 66. While the question of whether a chemical substance is an illegal drug may be determined objectively in a laboratory, the determination as to whether books, periodicals or movies are obscene will vary

⁹ See the reference to RICO's legislative history at footnote 1, *supra*.

from publication to publication, community to community, and from jury to jury, as each applies the standard of *Miller v. California*, 413 U.S. 15 (1973). Permitting nationwide seizure in effect impermissibly abandons the diversity of community standards mandated by *Miller*, for the unconstitutional and dangerous standard of the lowest common denominator.

Many familiar examples serve as reminders that books now recognized as literary classics were once banned as obscene under the standards of their day. If RICO had been widespread a few decades ago, booksellers might have had their stores seized merely for stocking the latest copies of works by Theodore Dreiser, D.H. Lawrence, or Edmund Wilson. As Justice Scalia noted in *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 252-53 (1990) (concurring and dissenting), "RICO penalties for obscenity . . . intimidate not just the porn-shop owner, but also the general bookseller who has been the traditional seller of new books such as *Ulysses*." See also *Commonwealth v. Friede*, 271 Mass. 318, 171 N.E. 472 (1930) (Dreiser's *An American Tragedy* held obscene); *People v. Doubleday & Co.*, 272 App. Div. 799, 71 N.Y.S.2d 736 (1st Dept.), *aff'd*, 297 N.Y. 687, 77 N.E.2d 6 (1947), *aff'd*, 335 U.S. 848 (1948) (Wilson's *Memoirs of Hecate County* held obscene); *People v. Dial Press, Inc.*, 182 Misc. 416, 48 N.Y.S.2d 480 (N.Y. Magis. Ct. 1944) (holding D.H. Lawrence's *Lady Chatterly's Lover* obscene). See also *United States v. One Book Called "Ulysses"*, 5 F. Supp. 182 (S.D.N.Y. 1933), *aff'd*, 72 F.2d 705 (2d Cir. 1934) (unsuccessful obscenity challenge to Joyce's *Ulysses*).

Such cases as *Playboy Enterprises, Inc. v. Meese*, 639 F. Supp. 581 (D.D.C. 1986), and *Council for Periodical Distributors Ass'n v. Evans*, 642 F. Supp. 552 (M.D. Ala. 1986), *aff'd in part and vacated in part*, 827 F.2d 1483 (11th Cir. 1987), show the real danger that a vocal minority in a community will use the RICO statutes to threaten the entire business of any bookseller or retailer who deals in material which, though constitutionally protected, is deemed objectionable. The bur-

den will be particularly great on a regional or national book, periodical or video business which, by distributing material that might be considered obscene in only one or two communities in the state, could potentially have its entire business seized.

The result can only be that booksellers, publishers and distributors will avoid disputed works in order to avoid the threat of forfeiture of their entire businesses. By its draconian penalties, RICO will thus impermissibly chill the dissemination of controversial protected materials, and is therefore unconstitutional.

III.

RICO'S FORFEITURE PROVISIONS ARE NOT SUFFICIENTLY NARROWLY TAILORED WHEN APPLIED TO A SPEECH BUSINESS TO SURVIVE FIRST AMENDMENT SCRUTINY

Two courts of appeals have ordered the seizure and destruction under RICO of entire speech business's inventories based on findings that a minimal number of expressive materials were obscene. Such an application of RICO forfeiture violates this Court's long-held admonition that criminal laws must be tailored narrowly and carefully to the extent they curtail First Amendment activities. See *Smith v. California*, 361 U.S. 147, 150-51 (1959) ("Our decisions furnish examples of legal devices and doctrines in most applications consistent with the Constitution, which cannot be applied in settings where they have the collateral effect of inhibiting the freedom of expression, by making the individual more reluctant to exercise it."). See also *Simon and Schuster, Inc. v. Members of the N.Y. State Crime Victims Board*, 112 S. Ct. 501, 509 (1991) ("[W]e have long recognized that even regulations aimed at proper governmental concerns can restrict unduly the exercise of rights protected by the First Amendment.").

In *Adult Video Ass'n v. Barr*, 1992 U.S. App. LEXIS 13786, No. 90-55252, slip op. at 6838 (9th Cir. June 18, 1992), the Ninth Circuit held that RICO's forfeiture provisions do not pass constitutional muster, and that they must be considerably narrowed in order to avoid dangerous abridgement of First Amendment rights:

[T]he current breadth of RICO's forfeiture provision cannot pass constitutional muster. At the very least, those assets or interests of the defendant invested in legitimate expressive activity being conducted by parts of the enterprise uninvolved or only marginally involved in the racketeering activity may not be forfeited. . . . Tailoring the scope of forfeiture acknowledges that in obscenity cases, unlike traditional RICO prosecutions, a countervailing concern for protecting the public's right to receive, as well as the defendant's right to engage in, non-obscene speech demands a more delicate approach to forfeitures. . . . The forfeiture of assets derived from drugs, arson, fraud, and murder rarely, if ever, implicates a public right of access to information. The forfeiture of assets loosely affiliated with obscenity offenses, by contrast, hurts not just the defendant, but also those members of the public who wish to obtain sexually explicit and erotic videotapes. Government "is not free to adopt whatever procedures it pleases for dealing with obscenity . . . without regard to the possible consequences for constitutionally protected speech."

Amici submit that the Ninth Circuit's analysis in *Adult Video Ass'n* comports with this Court's prior decisions. RICO forfeiture, as written and as applied by the court below, is unconstitutionally overbroad and a prior restraint when applied to a speech business. *Amici* accept, however, that limited forfeiture may comply with the First Amendment. Material

found obscene under the standards of a community may be seized and destroyed if located in such community. In addition, any proceeds directly traceable to the sale of the obscene materials in the same community may similarly be seized. However, presumptively protected expressive material may not be seized and destroyed. Both the geographical limitation on material seized and the requirement that no protected expressive materials be destroyed are important and are constitutionally mandated.

The geographical limitation is required under the community standards test formulated in *Miller*. Expressive material is not found to be obscene generally and without limitation; it is found to be obscene with respect to a particular community. Cf. *United States v. Various Articles of Obscene Material*, 433 F. Supp. 1132 (S.D.N.Y. 1976) (material obscene in New York City may not be obscene in Lancaster, Pa.), *rev'd on other grounds*, 562 F.2d 185 (2d Cir. 1977), *cert. denied sub nom., Long v. United States*, 436 U.S. 931 (1978). Were forfeiture to extend beyond the community, the seizure would involve presumptively protected materials, a result unacceptable under the First Amendment. This is particularly relevant in the federal system where the prosecutor may choose a community with a particularly stringent community standard in which to indict. See e.g. *U.S. v. Calif. Publishers Liquidating Corp.*, 433 F. Supp. at 1138.

Further, the requirement that no protected materials be destroyed is important to guard against the danger warned of by Justice O'Connor in her concurrence in *Arcara* — that the government might use a "statute as a pretext for closing down a bookstore because it sold indecent books or because of the perceived secondary effects of having a purveyor of such books in the neighborhood." *Arcara*, 478 U.S. at 708. See also *U.S. v. P.H.E., Inc.*, 965 F.2d at 858. To the extent that RICO gives the government the power to destroy protected materials, then the government can target these enterprises selling or creating

protected speech of which the government disapproves, even though the speech is entitled to the full panoply of First Amendment protections. Under these circumstances of pretext, according to Justice O'Connor's reasoning, "the case would clearly implicate First Amendment concerns and require analysis under the appropriate First Amendment standard of review." *Arcara*, 478 U.S. at 708.

In *Fort Wayne Books*, this Court held that an entirely different analysis must take place when presumptively protected materials are seized, as opposed to ordinary unprotected contraband. See 489 U.S. at 46, 109 S. Ct. at 929. Yet the Court below made no distinction between the presumptively protected materials that were not only seized, but were destroyed. Certainly an application of a statute which makes no distinction between such a book burning and the destruction of ordinary contraband, such as a cache of illegal narcotics, pays little heed to rigor which this Court applied to such a distinction with respect to pre-trial seizures in *Fort Wayne Books*.

Even when the protected materials are directly traceable proceeds from the sale of unprotected materials, applying First Amendment scrutiny, they can be forfeited but must not be destroyed. Rather, through sale at auction, these protected materials should be returned to the marketplace of ideas.

CONCLUSION

For the foregoing reasons, *amici* respectfully request that the judgment of the Eighth Circuit requiring forfeiture of an entire speech business be reversed.

September 2, 1992

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

FERRIS J. ALEXANDER, SR.,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

**On Writ Of Certiorari To The
United States Court Of Appeals
For The Eighth Circuit**

**BRIEF FOR VIDEO SOFTWARE DEALERS
ASSOCIATION AS AMICUS CURIAE
IN SUPPORT OF PETITIONER**

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QUESTION PRESENTED

Amicus Curiae Video Software Dealers Association in this brief addresses the following question:

Whether the First Amendment prohibits the government from confiscating a private enterprise's entire inventory of expressive works because of a determination that a negligible fraction of that inventory was obscene.

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**BRIEF FOR VIDEO SOFTWARE DEALERS
 ASSOCIATION AS *AMICUS CURIAE*
 IN SUPPORT OF PETITIONER**

Amicus curiae Video Software Dealers Association,
 with the written consent of all parties, submits this
 brief in support of petitioner Ferris J. Alexander, Sr.

**INTEREST OF *AMICUS CURIAE* AND SUMMARY OF
 ARGUMENT**

Amicus curiae Video Software Dealers Association
 ("VSDA") is a national association of dealers and dis-
 tributors of recorded video programming that is re-
 played and viewed in private homes. The association

has over 3,000 regular members, representing close to 20,000 of the approximately 28,000 retail video outlets in the United States. Associate members of VSDA include the major motion picture companies, independent video producers and manufacturers of various products related to the video industry.

VSDA is aware that a group of *amici curiae* consisting of a broadly-based media coalition intends to submit a brief in support of petitioner in this case, and VSDA generally subscribes to the arguments of that group. Like the members of that group, VSDA maintains that the drastic forfeiture provisions of 18 U.S.C. § 1963 (the "RICO forfeiture law") are an unconstitutional form of sanction for the obscenity violations in this case. VSDA, however, submits this brief to stress, from the typical video dealer's point of view, the critical differences that distinguish those provisions from other kinds of criminal sanctions for obscenity.

Forfeiture under 18 U.S.C. § 1963 has an impact upon the distribution of video cassettes that differs, in a constitutionally significant way, from the effect of other sanctions employed in obscenity cases. As the Court has recognized, the inherent uncertainty in the definition of obscenity means that any sanction for obscenity will inhibit the distribution of erotic works that are not obscene, works that are fully protected under the First Amendment. And there is no question but that the more severe the sanction the greater the inhibition.

The RICO forfeiture law, however, does more than inhibit. Whenever applied to the owner of an establishment that sells works of expression, that law phys-

ically stops the distribution of all works—without regard to their status under the First Amendment—in the inventory of every store in the owner's "enterprise."

Even were the RICO forfeiture law never applied, the mere threat that it might be invoked for offenses predicated upon obscenity violations interferes with the distribution of protected erotica in two ways. First, it pressures the typical video dealer to refuse to carry films that have a sexual orientation—which typically constitute a minor fraction of the dealer's inventory—in order to protect his entire inventory from forfeiture. Second, for those few who resist that pressure, the RICO forfeiture law gives dealers who carry a broad line of films powerful incentive to segregate erotic works—whether or not obscene—and to offer them through a separate enterprise in order to reduce the risk of a RICO forfeiture of their entire video cassette business.

Application of the RICO forfeiture law in obscenity cases thus tends to remove from the shelves of broad-line video outlets, which represent the vast majority of the nation's video stores, protected works of expression that have erotic or sexual content. These dealers are induced either to carry no such works or, if feasible, to establish dual systems of distribution in which these protected works are offered solely in stores that specialize in sexually oriented material. This tendency to confine the distribution of expressive works to special and fewer retail outlets renders application of the RICO forfeiture law in obscenity cases inconsistent with the First Amendment.

RELEVANT CONSTITUTIONAL PROVISION AND STATUTE

The First Amendment to the Constitution of the United States reads, in pertinent part, as follows:

Congress shall make no law . . . abridging the freedom of speech, or of the press. . . .

Section 1961 of Title 18 of the United States Code reads, in pertinent part, as follows:

As used in this chapter—

(1) "racketeering activity" means (A) any act or threat involving . . . dealing in obscene matter . . . or (B) any act which is indictable under . . . title 18, United States Code . . . sections 1461-1465 (relating to obscene matter); . . .

(3) "person" includes any individual or entity capable of holding a legal or beneficial interest in property;

(4) "enterprise" includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity; . . .

(5) "pattern of racketeering activity" requires at least two acts of racketeering activity. . . .

Section 1962 of Title 18 of the United States Code reads, in pertinent part, as follows:

(a) It shall be unlawful for any person who has received any income derived, directly or

indirectly, from a pattern of racketeering activity . . . to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect interstate or foreign commerce.

(b) It shall be unlawful for any person through a pattern of racketeering activity . . . to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity. . . .

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section.

Section 1963 of Title 18 of the United States Code reads, in pertinent part, as follows:

(a) Whoever violates any provision of section 1962 of this chapter . . . shall forfeit to the United States, irrespective of any provision of State law—

(1) any interest the person has acquired or maintained in violation of Section 1962;

- (2) any —
 (A) interest in;
 (B) security of;
 (C) claim against; or
 (D) property or contractual right of
 any kind affording a source of influence
 over;

any enterprise which the person has
 established, operated, controlled, con-
 ducted, or participated in the conduct of,
 in violation of section 1962; and

- (3) any property constituting, or de-
 rived from, any proceeds which the per-
 son obtained, directly or indirectly, from
 racketeering activity . . . in violation of
 Section 1962.

STATEMENT

Petitioner Ferris J. Alexander, Sr. ("Alexander")
 owned and operated a chain of establishments in the
 Minneapolis area that included several retail outlets
 for video cassettes. His entire enterprise—a business
 comprising theater operations, wholesale distribution
 centers for books, magazines and video cassettes and
 retail stores for these products—was engaged pri-
 marily in the dissemination of erotic materials.¹

In May 1989, the federal government indicted Alex-
 ander for obscenity, RICO and tax violations. The
 RICO charges were predicated upon 34 alleged ob-
 scenity violations, all of which were based upon sales
 of five magazines and seven video cassettes. He was

¹ Alexander describes the materials as "officially-disfavored,
 albeit First-Amendment-protected, speech." Petition for a Writ
 of Certiorari, filed March 16, 1992, at p. 3.

convicted, *inter alia*, of 18 of the 34 obscenity charges
 and 3 RICO offenses. Only seven of the twelve al-
 legedly obscene items were found obscene. Under 18
 U.S.C. § 1963, however, his conviction for the RICO
 offenses mandated forfeiture of his entire enterprise,
 including "over one hundred thousand unlitigated,
 presumptively protected books, magazines, and video-
 tapes." Petition for Writ of Certiorari, filed March
 16, 1992, at p. 7 (emphasis added).

The concentration of Alexander's business in the
 sale and distribution of erotic material is not typical
 of retail video outlets in the United States. The retail
 level of the video cassette industry, for the most part,
 consists of stores that offer a broad line of video
 products, only a fraction of which are erotic or "adult"
 films.² Video dealers typically do not specialize in sex-
 ually explicit films or any other category of films
 available. Rather, they choose films for their inven-
 tory from over 17,000 titles available and stock a
 broad line of films that they believe will be of interest
 in their local market area. According to a 1986 VSDA
 annual survey of a representative group of VSDA
 members, approximately 77 percent of its members

² Classification of a film as "adult" by no means is equivalent
 to saying that the film is obscene. Most "adult" films do not
 satisfy the standards for obscenity laid down in *Miller v. Cal-
 ifornia*, 413 U.S. 15 (1973) in any community.

Films ordinarily are classified as "adult" films by producers,
 who largely rely upon subjective assessments of the level of any
 sexual content the film has. The Motion Picture Association of
 America does not rate all films, and there is no formal rating
 system for "adult" films. Many films other than "adult" films
 have sexual orientations.

carry "adult" films, which typically comprise about 13 per cent of their inventory.

ARGUMENT

THE RICO FORFEITURE LAW AS APPLIED IN THIS CASE IS AN UNCONSTITUTIONAL FORM OF SANCTION FOR OFFENSES PREDICATED UPON VIOLATIONS OF THE OBSCENITY LAWS

The RICO forfeiture law, as applied in this case, is a great deal more than a severe punishment for obscenity violations. Unlike a heavy fine or a long prison term, the forfeiture in this case is governmental action that directly stopped dissemination of over 100,000 existing works of expression—works that have not been found obscene or even sexually explicit. Neither fine nor prison term constitutes that kind of restraint.

In fact, the forfeiture in this case is a classic prior restraint. The works in Alexander's inventory have been seized by the government before any determination of their status under the First Amendment—governmental action that repeatedly has been condemned as a prior restraint. *See, e.g., Fort Wayne Books, Inc. v. Indiana*, 489 U.S. 46, 66-67 (1989); *Vance v. Universal Amusement Co.*, 445 U.S. 308, 316-317 (1980); *A Quantity of Copies of Books v. Kansas*, 378 U.S. 205, 210 (1964); *Marcus v. Search Warrant*, 367 U.S. 717, 731 (1961).

The fact that the restraint in this case takes the form of a seizure of expressive works to sanction the unlawful distribution of other works is no reason to hold the prior restraint doctrine inapplicable. *Compare Adult Video Association v. Barr*, 960 F.2d 781, 788-790 (9th Cir. 1992). As the decision in *Marcus v.*

Search Warrant, supra, illustrates, the unconstitutionality of governmental seizures of expressive works lies in the fact that such works are presumptively protected under the First Amendment. Thus, any seizure of works that have not been adjudged obscene or otherwise unprotected runs afoul of the First Amendment.

In *Marcus*, the Court reviewed a government seizure of publications pursuant to a search warrant issued upon probable cause "to believe that obscene material 'is being held or kept in any place or in any building.'" *Marcus v. Search Warrant*, 367 U.S. at 719. The Court held that seizure unconstitutional after a review of some of the history leading to the First Amendment. As the Court observed—

The use by government of the power of search and seizure as an adjunct to a system for the suppression of objectionable publications is not new. Historically the struggle for freedom of speech and press in England was bound up with the issue of the scope of the search and seizure power. . . .

Id. at 724.

After recounting some of the critical conflicts in that struggle, the Court held that the procedures "as applied in [*Marcus*] lacked the safeguards which due process demands to assure non-obscene material the constitutional protection to which it is entitled." *Id.* at 731. Because of this constitutional infirmity, "there were suppressed and withheld from the market for over two months 180 publications" that had not been found obscene by the lower courts in *Marcus*.

The RICO forfeiture in the instant case, like the seizure in *Marcus*, was accomplished under a statutory scheme that provides no safeguards to assure that protected works avoid seizure. On the contrary, the RICO statute compels automatic forfeiture of "any interest [held by an offender] in . . . any enterprise which the [offender] has established, operated, controlled, conducted, or participated in the conduct of, in violation of [18 U.S.C. § 1962]." Where, as in the instant case, the offender owns an enterprise that is found to have sold or rented obscene works, the entire enterprise is forfeited, including its inventory of presumptively protected works. The RICO forfeiture law thus not only lacks procedures to prevent the seizure of protected works, it virtually requires seizure of such works—and, what is worse, the law provides no means by which the owner can compel the return of his or her protected works.³

Beyond direct curtailment of the offender's freedom to sell protected works, however, the RICO forfeiture law constitutes an indirect restraint that raises First Amendment concerns of no less gravity. On several occasions in the past, the Court has pointed to the danger that obscenity laws and other governmental rules affecting expression engender a system of "self-censorship"—that is, a system in which persons refrain from publishing protected expression or alter their decisions about expressive activity rather than take the risk that they might subsequently be challenged by the government. See, e.g., *New York Times Co. v. Sullivan*, 376 U.S. 254, 278-79 (1964); *Smith v. California*, 361 U.S. 147 (1959).

³ Thus, in the instant case, Alexander's entire inventory was destroyed.

This indirect influence upon the exercise of First Amendment freedoms—referred to as a "chilling effect"—has often been the principal reason for First Amendment scrutiny. See, e.g., *Minneapolis Star and Tribune Co. v. Minneapolis Commissioner of Revenue*, 460 U.S. 575, 585 (1983); *Talley v. California*, 362 U.S. 60 (1960). "[I]nhibition as well as prohibition against the exercise of precious First amendment rights is a power denied to government." *Lamont v. Postmaster General of the United States*, 281 U.S. 301, 309 (1965) (Brennan, J., concurring).

Threat of fine or imprisonment undoubtedly induces many video dealers to reject not only obscene videos, but also protected videos with sexual content. Dealers tend rightly to believe that videos with sexual content have the highest probability of being challenged as obscene. The RICO forfeiture law dramatically increases that chilling effect.

In addition to the chilling effect inherent in any sanction for obscenity, however, application of the RICO forfeiture law in obscenity cases has another unconstitutional consequence. For those dealers who can withstand the "chill," the law creates a strong incentive for them to establish a separate "enterprise" for videos with a sexual orientation.⁴ By establishing a separate enterprise, a dealer can limit its exposure to a RICO forfeiture of the inventory and assets of the enterprise featuring films with sexual

⁴ The term "enterprise" is defined in RICO forfeiture law to include any "individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity." 18 U.S.C. § 1961.

content while protecting the remainder of its operations.

Such governmentally-induced segregation of protected works poses serious First Amendment concerns. It deprives the public of access to a free market in constitutionally protected material. Many customers frequent a video store without a clear idea of the specific film they wish to rent. They examine the titles available to find movies that strike their fancy. Customers of broadline video stores can select from a variety of films that is determined only by choices made by individual dealers. The available films generally include films with and films without substantial sexual content.

If video dealers are forced by fear of the draconian sanctions of the RICO forfeiture law to segregate their wares, customer options will be diminished by virtue of a government threat. Compare, *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58 (1963). And, while sexually-explicit materials may be available in stores specializing in those materials, customers often are reluctant to patronize such stores, even if the store avoids carrying obscene films. Thus, the RICO forfeiture law burdens the public's ability to select the material it wishes to watch—or read or listen to—and producers, distributors and dealers wish to provide. That burden cannot be justified under the First Amendment. Cf. *Lamont v. Postmaster General*, 381 U.S. 301 (1965).

The RICO forfeiture law, moreover, interferes with the video dealers expressive rights. Video dealers exercise these rights not only in the selection of the films for inventory, but also by such choices as the arrangement of the films in the store, the manner in

which the films are promoted and the setting in which the dealer offers those films. These decisions are the "editorial" decisions of the video dealer, analogous to decisions made by newspaper and magazine editors, bookstore owners and publishers concerning the content of the expression they choose to communicate. It is well established that this editorial judgment is fully protected by the First Amendment. *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 258 (1974).

Because of its tendency to confine the distribution of constitutionally protected expression to a limited number of specialized outlets and its overall chilling effect on dealers' exercise of their First Amendment rights, application of the RICO forfeiture law for offenses predicated upon obscenity violations must be tested under First Amendment standards. Since the applicability of these sanctions turns on the content of the expressive works, the constitutionality of the forfeiture provision must be tested by the standards employed to test statutes that discriminate on the basis of the content of the message. Thus, the government must justify the law as necessary to serve a compelling government interest and narrowly drawn to achieve that end. *Simon & Shuster, Inc. v. Members of the New York State Crime Victims Board*, 112 S. Ct. 501, 116 L.ed.2d 476 (1992).

However, even if that standard is deemed not applicable, application of the RICO forfeiture provisions in obscenity cases must satisfy the First Amendment test prescribed for content-neutral regulation. Under that test, restraints imposed by the RICO forfeiture law could be upheld only if the government establishes that they are "no greater than is necessary to the

furtherance of [an important or substantial governmental interest]." *United States v. O'Brien*, 391 U.S. 367, 377 (1968); see also *Clark v. Community for Creative Non-Violence*, 468 U.S. 288 (1984).

Neither constitutional test can be met in the instant case. Presumably the interest that the government seeks to further is the eradication of obscene expression from American society.⁵ It hardly is self-evident, however, that that interest is compelling or that forfeiture of vast quantities of protected works is even reasonably designed—much less essential—to further any governmental interest in combatting obscenity. In order to sustain the RICO forfeiture provisions, the government must show that traditional criminal sanctions—or even a narrower seizure of works that previously have been found obscene—are insufficient to accomplish its legitimate purposes. It has not met and cannot meet that burden in this case. The RICO forfeiture law is not essential to further a sufficiently compelling interest and cannot constitutionally be applied in the manner it was applied in the instant case.

⁵ If the government's interest is to suppress any broader category of sexual expression, the RICO forfeiture law would fail as the instrumentality of an unconstitutional program.

CONCLUSION

For the reasons stated herein, the judgment of the court below should be reversed.

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

FERRIS J. ALEXANDER, SR.,
Petitioner,
v.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the Eighth Circuit

BRIEF OF AMICI CURIAE
AMERICAN LIBRARY ASSOCIATION,
FREEDOM TO READ FOUNDATION, AND
ASSOCIATION OF AMERICAN PUBLISHERS, INC.
IN SUPPORT OF PETITIONER

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**BRIEF OF AMICI CURIAE
AMERICAN LIBRARY ASSOCIATION,
FREEDOM TO READ FOUNDATION, AND
ASSOCIATION OF AMERICAN PUBLISHERS, INC.
IN SUPPORT OF PETITIONER**

INTEREST OF AMICI

The American Library Association ("ALA"), founded in 1876, is a nonprofit, educational organization committed to the preservation of the library as a resource indispensable to the intellectual, cultural, and educational welfare of the nation. ALA is the oldest and largest library association in the world and is the chief voice of the modern library movement in North America. ALA's membership includes more than 3,000 public, academic, specialty and school libraries and more than 52,500 individuals, primarily librarians.

The Freedom to Read Foundation ("Foundation") is a nonprofit organization established in 1969 by ALA to promote and defend First Amendment rights; to foster libraries as institutions fulfilling the promise of the First Amendment for every citizen; to support the right of libraries to include in their collections and make available to the public any work they may legally acquire; and to set legal precedent for the freedom to read of all citizens.

The Association of American Publishers, Inc. ("AAP") is the major national association in the United States of publishers of general books, textbooks and educational materials. Its over two hundred members include most of the major commercial book publishers, including university presses and scholarly associations. AAP's members publish works which run the gamut of published materials, including non-fiction, biography, history and fiction.

American libraries, library collections, their users, major publishers, and the readers of their works have

not been the initial victims of obscenity-based RICO forfeiture. Nor would they necessarily be the first victims of the dangerous changes in this Court's First Amendment jurisprudence that would be required to uphold such forfeiture. *But no mistake should be made:* if in this case this Court were to uphold the forfeiture of constitutionally protected expressive materials and other means of *future* speech as a response to the commission of speech crimes, the Court would encroach profoundly on expressive liberty in this country. Libraries and their users, publishers and their readers—together with all Americans—would be the ultimate victims of such a holding.

Libraries and publishers are both essential to and dependent upon the thriving, unrestrained American marketplace of ideas that is a major source of energy and light for the world. Libraries and publishers make available to *all* Americans the essential means for their participation in that marketplace: a realm of information, ideas, and images where the *reader* is sovereign, empowered to seek, contemplate, accept, or reject material subject only to limitations on resources and the reader's own values and intellect. But just as they enrich and enable the marketplace of ideas, libraries and publishers also *depend* on the vitality of that marketplace. They can make available only that which is available to them, that which they are free to make available, and that which their patrons are free to see. The First Amendment—and its protection of *all* participants in the marketplace of ideas—is thus the essential prerequisite to fulfillment of libraries' and publishers' vital social function.

Although on its face this case deals only with the fate of one "adult" business in Minnesota, the outcome could radically diminish the protection afforded expression in this country, with a corresponding diminution in libraries' and publishers' power to offer readers sovereignty over information, ideas and images. *Amici* hope this brief will demonstrate that much more is at stake than the

simple fate of Mr. Alexander and his inventory of presumptively protected expressive materials, which the United States government, under the auspices of RICO, has now destroyed.

INTRODUCTION AND SUMMARY OF ARGUMENT

In an effort to disable the petitioner from committing speech crimes in the future, the government in this case is claiming the power to *confiscate, crush and burn* literally thousands of presumptively protected expressive materials and to confiscate virtually all other means of future expression as a "punishment" for past speech crimes. This claim raises First Amendment issues of surpassing importance, specifically preserved and foreshadowed by this Court in *Fort Wayne Books, Inc. v. Indiana*, 489 U.S. 46, 109 S.Ct. 916 (1989).

At stake is the critical presumption, preserved throughout this Court's prior restraint jurisprudence, that speech must be presumed to be protected until duly adjudicated otherwise. *E.g., Roaden v. Kentucky*, 413 U.S. 496 (1973). RICO requires forfeiture of all assets associated with prior obscenity offenses to ensure that the defendant will commit no such offenses in the future. To permit suppression of virtually all of the defendant's future speech in order to prevent some that might prove to be obscene would utterly eviscerate the fundamental premise that future speech is "presumptively protected." Put simply, the forfeiture order blatantly violates the prohibition against prior restraints—"the most serious and the least tolerable infringement on First Amendment rights," *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976).

The government's formalistic defenses threaten yet another bedrock principle, one that time and again has guided the free-speech decisions of this Court: in First Amendment cases, and particularly prior restraint cases, "the court has regard to *substance and not to mere*

matters of form, and . . . in accordance with familiar principles, . . . statute[s] must be tested by [their] operation and effect.” *Near v. Minnesota*, 283 U.S. 697, 708 (1931) (emphasis added). This doctrine of preventing the *substance* of censorship, whatever its *form*, has preserved the health of the system of free expression even when government officials have sought to pour the old poison of censorship into new vials. This rule ensures that the First Amendment will be as resourceful in protecting expression as government officials may prove to be in attempting to censor it.

To uphold RICO forfeiture in this case, the government asks this Court to abandon this critical First Amendment principle. Government plainly may *not* use a *civil* action to disable *future* speech in order to prevent recurrence of a past speech violation. *E.g.*, *Near v. Minnesota*, 283 U.S. 697 (1931); *Vance v. Universal Amusement Co.*, 445 U.S. 308 (1980). The forfeiture at issue here can therefore be upheld only on the radical premise that government may use a *criminal* action to achieve this forbidden purpose. *See Alexander v. Thornburgh*, 943 F.2d 825, 834 (8th Cir. 1991) (relying on “the substantial difference between prior restraints and criminal penalties”). Such a distinction between civil remedies and criminal punishments would inject a crippling formalism into this Court’s First Amendment jurisprudence that would permit—not only here, but in other cases as well—the evasion of crucial First Amendment protections, to the great detriment of the justly celebrated American marketplace of ideas. This Court should look through the form to the substance, and set aside the forfeiture as an unconstitutional prior restraint. (Point I).

Moreover, the application of RICO’s broad forfeiture provisions to speech crimes such as obscenity creates an intolerable risk of *intentional* censorship of protected speech. RICO confers on prosecutors the discretion to decide whether to add a RICO count to an obscenity indictment, and thereby trigger RICO forfeiture of the

entire speech enterprise. Consequently, RICO gives prosecutors a unique and potent tool with which to *seek* suppression of a particular defendant’s *protected* speech. Any such motive for invocation of RICO would be unlawful, *see United States v. PHE, Inc.*, 965 F.2d 848, 849 (10th Cir. 1992); *PHE, Inc. v. U.S. Dep’t. of Justice*, 743 F. Supp. 15, 21-23 (D.D.C. 1990) (collecting cases), but to establish that motive would, in most cases, be literally impossible. In the absence of any meaningful regulations channeling the exercise of this prosecutorial discretion, RICO forfeiture raises a constitutionally intolerable risk that power will be abused for the intentional purpose of suppressing protected expression. (Point II).

ARGUMENT

I. WHEN BASED UPON PREDICATE ACTS OF OBSCENE SPEECH, RICO FORFEITURE IMPOSES AN UNCONSTITUTIONAL PRIOR RESTRAINT ON EXPRESSION.

A. RICO Forfeiture Revives a Previously Shunned Form of Post-Conviction Remedy That Bears No Resemblance to Traditional Forms of “Punishment” and, As Applied to Speech Crimes, Poses Grave Threats to First Amendment Freedoms.

RICO established “new weapons of unprecedented scope.” *Russello v. United States*, 464 U.S. 16, 26 (1983). Such measures were thought necessary “for an assault upon organized crime and its economic roots.” *Id.* RICO’s central weapon in this “assault” was its mandatory criminal forfeiture provision.¹ Prior to RICO’s enactment in

¹ The statute *requires* forfeiture of not only any interest the defendant has indirectly or directly acquired or maintained in violation of the Act and all proceeds therefrom, but also any interest in the enterprise involved in the RICO violation or in “any enterprise” which affords him a “source of influence” over the criminal enterprise (his economic base). 18 U.S.C. § 1963(a).

1970, *in personam* criminal forfeiture—forfeiture of an individual's estate as a result of his criminal conviction—was anathema in American jurisprudence, and was affirmatively prohibited.²

Criminal forfeitures *in personam* arose in medieval England, where, following a felony conviction, the entire estate of the felon was confiscated and any inheritance from the felon was prohibited.³ In the Magna Carta, forfeiture on the ground of commission of a felony was sharply curtailed, but survived to an extent in the English common law.⁴ There is some evidence that criminal forfeiture was occasionally used in a few early colonies, but it quickly fell into disrepute and did not long survive in the New World. Calling upon the English experience, the Framers of the Constitution limited criminal forfeiture for treason to the life estate of the defendant's property.⁵ Moreover, in 1790, the First Congress—the same Congress that later adopted the Bill of

² Unlike *in rem* forfeiture, which depends upon the character of the property rather than its owner's crime, and is applied against contraband or articles put to unlawful use, 18 U.S.C. § 1963 operates against the person of the defendant as a consequence of criminal conviction and includes forfeiture of a portion or all of his estate. *In rem* forfeitures are civil proceedings separate from any criminal case, and the property to be forfeited must be clearly identifiable and located within the court's jurisdiction. In contrast, *in personam* actions can reach assets outside the court's jurisdiction, as well as assets (such as money) that can no longer be specifically traced to the criminal activity. See *The Palmyra*, 25 U.S. (12 Wheat.) 1, 14-15 (1827) (Story, J.) (describing distinction between *in rem* and *in personam* forfeitures).

³ See Taylor, *Forfeiture Under 18 U.S.C. § 1963—RICO's Most Powerful Weapon*, 17 Am. Crim. L. Rev. 379, 381 (1980) (hereinafter "Taylor").

⁴ See *id.*

⁵ "The Congress shall have power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted." U.S. Const. art. III, § 3.

Rights—abolished forfeiture of estate and corruption of the blood for any federal crime.⁶ *In personam* forfeiture of estate for a felony conviction was deemed "an unfair, undue, and unusual punishment."⁷ See *United States v. Martino*, 681 F.2d 952, 962 (5th Cir. 1982) (Polito, J., dissenting) ("Just as nature abhors a vacuum, historically our society has abhorred forfeitures."), *aff'd* 464 U.S. 16 (1983). It did not reappear in American jurisprudence until 180 years later, when Congress enacted RICO.⁸

In personam forfeiture as revived in RICO was not only unprecedented in U.S. law, but also—in the words of the statute's principal sponsors—"[d]rastic [and] extraordinary." *Russello*, 464 U.S. at 26-27 (quoting Sens. McClellan and Hruska). Critically for present purposes, Congress declared that "[i]t is the purpose of this Act to seek the eradication of organized crime." *Id.* at 27 (emphasis added). The forfeiture provision, in particular, was intended not simply to deter unlawful conduct—as the more traditional penalties of imprisonment and fines were already intended to do—but to "incapacitate, and . . . directly to remove the corrupting influence from the channels of commerce." *Id.* at 28 (emphasis added).

⁶ "Provided always, and be it enacted, That, no conviction or judgment for any of the offenses aforesaid, shall work corruption of the blood, or any forfeiture of estate." Act of Apr. 30, 1790, § 24, 1 Stat. 112 (1790). The statute is now codified as 18 U.S.C. § 3563.

⁷ Taylor, *supra* n.3, at 383.

⁸ The only prior example of *in personam* forfeiture in American history was the Confiscation Act of 1862, which allowed forfeiture of property that belonged to leaders of the Southern secessionist States. This Court later held that Act unconstitutional. See *Bigelow v. Forrest*, 76 U.S. 339, 352-53 (1870). The 91st Congress recognized that, in enacting RICO criminal forfeiture, it was reviving a long dormant remedy. Indeed, Congress acknowledged that it was partially repealing the 1790 Act. See S. Rep. 91-617 at 79-80; 116 Cong. Rec. 35205, 35208 (Reps. Mikva, Ryan); 1970 U.S. Code Cong. & Admin. News 4083-84.

(quoting Sen. McClellan). As Senator McClellan made plain, RICO forfeiture was specifically intended to "provide a means of wholesale removal" of offending enterprises and "prevention of their return." 116 Cong. Rec. 18939 (1970) (emphasis added). Congress believed that neither *in rem* forfeiture nor the traditional criminal penalties of imprisonment and fines were sufficient to achieve the "drastic" prophylactic objective of irrevocably preventing the enterprise from again violating the "racketeering" law. *United States v. Turkette*, 452 U.S. 576, 589 (1981).

As originally enacted in 1970, RICO targeted the illegal activities of organized crime and did not include obscenity or other speech crimes as predicate offenses. Thus, even with its unprecedented and unusually severe remedies, RICO did not pose First Amendment dangers. In 1984, however, apparently without any consideration of the First Amendment implications, Congress adopted Senator Jesse Helms' proposal⁹ and "inject[ed] obscenity offenses into a statutory scheme designed to curtail an entirely different kind of antisocial conduct." *Fort Wayne Books*, 109 S. Ct. at 932 (Stevens, J., concurring and dissenting) (describing effect of analogous Indiana RICO provision). The goal was clear: preventing entities convicted of obscenity violations from ever again uttering obscene speech.

Extending the reach of this radical weapon to speech crimes has placed a dangerous weapon for censorship in the hands of federal officials. Since the amendment, a federal Commission on Pornography has advocated the use of RICO forfeiture to "literally put . . . out of business" publishers, booksellers, and distributors of sexually oriented expressive material. Attorney General's Comm'n on Pornography, 1 Final Report 464 (1986). Forfeiture, that Commission argued, should be "used to uproot the capital of pornography producers and distributors . . .

⁹ Act of Oct. 12, 1974, Pub. L. 98-473, 98 Stat. 2143.

[and] substantially handicap these businesses." *Id.* at 498. The Commission urged that "the stringent forfeiture provisions under RICO" be used to "eliminate" the publishers and distributors of materials which the Commission disapproved—despite the fact that the speech suppressed thereby would never have been adjudicated obscene. *Id.* at 519.

B. RICO Forfeiture of Presumptively Protected Expressive Materials and the Means of Future Speech, Based on Past Obscenity Violations, Is a Classic Prior Restraint.

The facts of this case dramatically illustrate the threat to First Amendment values posed by the government's use of RICO forfeiture to regulate expression. Invoking the broad "source of influence" provision, 18 U.S.C. § 1963(a)(2), the court ordered forfeiture of petitioner's chain of thirteen retail bookstores and video stores; petitioner's wholesale media distribution business; and all the assets associated with those expressive businesses: numerous parcels of real estate, bank accounts, currency, and vehicles, and over one hundred thousand books, magazines, and videos, all with a value in the millions of dollars. *Alexander v. Thornburgh*, 943 F.2d at 829. The government confiscated, and has already destroyed by burning and crushing, petitioner's entire inventory of presumptively constitutionally protected expressive materials, based solely on a finding that seven items (four magazines and three videos) were found to be obscene.¹⁰ Notably, among the materials destroyed in the name of preventing future obscenity violations were all copies of five items the government had indicated, but the jury considered and declined to convict. As a result, petitioner can never distribute the presumptively protected books, periodicals, and videos forfeited, and has no realistic ability to acquire other materials to sell through those

¹⁰ Those obscenity violations served as the sole basis for petitioner's RICO convictions. *Alexander v. Thornburgh*, 943 F.2d at 829.

or other outlets. Consistent with RICO's design, the government has quite deliberately "uprooted" and "eradicated" petitioner's expressive business and his ability to continue to distribute expressive materials.

Such incapacitation of an offending business might be a constitutional means to prevent recurrence of a non-speech offense such as gambling or drug trafficking. But the seizure and destruction of presumptively protected expressive materials and the instrumentalities of speech, in an effort to prevent future *obscenity* violations, is a classic prior restraint prohibited by the First Amendment.¹¹ "The special vice of a prior restraint is that communication will be suppressed . . . before an adequate determination that it is unprotected by the First Amendment." *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 390 (1973). Once a specific expressive act (e.g., the sale of a specific book or videotape) has been found constitutionally unprotected, the government may impose an appropriate punishment.¹² But even when there has been a judicial deter-

¹¹ As Justice Stevens explained in *Fort Wayne Books*:

[T]here is a difference of constitutional dimension between an enterprise that is engaged in the business of selling and exhibiting books, magazines, and videotapes and one that is engaged in another commercial activity, lawful or unlawful. A bookstore receiving revenue from sales of obscene books is not the same as a hardware store or pizza parlor funded by loan-sharking proceeds. The presumptive First Amendment protection accorded the former does not apply either to the predicate offense or to the business use in the latter.

109 S.Ct. at 939 (concurring and dissenting).

¹² Even if RICO forfeiture's sole purpose were to "depriv[e] criminals of the profits of their crimes," it would not remove the provision from First Amendment scrutiny. *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 112 S.Ct. 501, 510 (1991). Nevertheless, the government may order forfeiture of the items found obscene in the community in which the finding was made, *Kingsley Books, Inc. v. Brown*, 354 U.S. 436 (1957), and presumably may order forfeiture of the proceeds directly attributable to the unprotected transactions. But RICO has far more ambi-

mination that *past* expression was unprotected, *future* expressive activities (e.g., the sale of *different* books, magazines or videotapes) remain presumptively protected under the First Amendment. See, e.g., *Fort Wayne Books*, 109 S. Ct. at 921, 929. Except in extraordinary circumstances not applicable here, government may not restrain specific future speech absent a prior, judicial determination that *that* speech is not constitutionally protected.¹³ The First Amendment thus precludes government from responding to past unprotected expression by preventing presumptively protected future speech on the theory that it, too, may prove to be unprotected.

That proposition is at the heart of this Court's prior restraint jurisprudence. In *Near v. Minnesota*, the seminal case on prior restraints, for example, the trial court found several past issues of a newspaper to be "malicious, scandalous, or defamatory." As a remedy, the court enjoined the publishers from disseminating other libelous

tious and "far-reaching" objectives than seizure of duly adjudicated contraband or disgorgment of illegal profits. *Russello v. United States*, 464 U.S. at 27. The materials proved to be obscene and the profits therefrom almost invariably constitute a minute percentage of the materials and assets forfeited under RICO, as in the present case. The court below ordered forfeiture of millions of dollars worth of corporate assets—including thousands of books, periodicals and videos—based on a finding that petitioner had sold seven items of unprotected expression. The obvious and intended consequence of such massive forfeiture was not mere disgorgment of ill-gotten gains, but achievement of RICO's broader purpose of exterminating the enterprise by confiscating its entire economic base.

¹³ The Supreme Court has repeatedly explained that underlying this prior restraint doctrine "is a theory deeply etched in our law: a free society prefers to punish the few who abuse rights of speech *after* they break the law than to throttle them and all others beforehand. It is always difficult to know in advance what an individual will say, and the line between legitimate and illegitimate speech is often so finely drawn that the risks of freewheeling censorship are formidable." *Vance*, 445 U.S. at 316, n.13, quoting *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 558-559 (1975) (emphasis in original).

issues. 283 U.S. at 706.¹⁴ The Supreme Court assumed for purposes of decision that under the First and Fourteenth Amendments the State could impose criminal punishment for the issues that had been found unlawful. *Id.* at 715. Nonetheless, the Supreme Court held the injunction unconstitutional as an impermissible prior restraint against future publication.

Near holds that it is unconstitutional "to enjoin the dissemination of future issues of a publication because its past issues had been found offensive." *Kingsley Books, Inc. v. Brown*, 354 U.S. 436, 445 (1957) (describing *Near*). As the Eleventh Circuit has observed, "in *Near* the Supreme Court condemned prior restraints prohibiting future expression that may fall within the purview of the First Amendment where such restraint is based only on a finding of unprotected present conduct." *Gayety Theatres, Inc. v. City of Miami*, 719 F.2d 1550, 1551 (11th Cir. 1983) (mem.) (affirming on the basis of district court's opinion). Such a restraint on future speech is "the essence of censorship." *Kingsley Books*, 354 U.S. at 445, quoting *Near*, 283 U.S. at 713. *Accord Organization for a Better Austin v. Keefe*, 402 U.S. 415, 418-419 (1971); *Vance v. Universal Amusement Co.*, 587 F.2d 159, 166 (5th Cir. 1978) (*en banc*), *aff'd* 445 U.S. 308 (1980) (*per curiam*).¹⁵

¹⁴ Minnesota's nuisance abatement statute applied to obscenity as well as to "malicious, scandalous and defamatory" publications. 283 U.S. at 702.

¹⁵ This Court's decision in *Vance*, among numerous other decisions, demonstrates clearly that the government is wrong in relying upon the Fourth Circuit's holding that prior restraint doctrine is inapplicable to any case concerning obscenity. *See* Opp. Cert. at 7, quoting *United States v. Pryba*, 900 F.2d 748, 754-755 (4th Cir.), *cert. denied*, 111 S.Ct. 305 (1990). Past obscenity violations are no more a valid basis for imposing a prior restraint than past libels, which were at issue in *Near*. *FW/PBS, Inc. v. City of Dallas*, 110 S.Ct. 596 (1990); *Fort Wayne Books v. Indiana*, 489 U.S. 46 (1989); *Vance v. Universal Amusement Co.*, 445 U.S. 308 (1980); *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546 (1975); *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58 (1963); *Marcus v. Search War-*

That is precisely the vice of the court's forfeiture order here. Relying on isolated findings of past unprotected expression, the Court imposed a forfeiture order designed to disable petitioner from engaging in unprotected expression in the future, by suppressing massive quantities of presumptively protected future expression. Without any determination of obscenity—indeed, with some destroyed items having been found *not* to be obscene—the thousands of presumptively constitutional books, periodicals, and videos in petitioner's inventory have been permanently removed from circulation by the most final restraints possible.¹⁶ And petitioner has been disabled from acquiring or disseminating additional expressive materials. As in *Vance*, "the state made the mistake of pro-

rants, 367 U.S. 717 (1961). Thus forfeiture of an entire broadcasting business or newspaper would be no more lawful as a consequence of an obscenity conviction than of a libel conviction.

Numerous courts, following *Near* and *Vance*, have struck down as invalid prior restraints closure and "padlocking" remedies imposed to shut down businesses that committed prior obscenity offenses. *E.g.*, *People v. Sequoia Books, Inc.*, 127 Ill.2d 271, 537 N.E.2d 302 (1989), *cert. denied*, 110 S. Ct. 835 (1990); *Minot v. Central Ave. News Inc.*, 308 N.W.2d 851 (N.D.), *appeal dismissed*, 454 U.S. 1117 (1981); *Gulf States Theatres of Inc. v. Richardson*, 287 So.2d 480, 490-492 (La. 1973).

¹⁶ The court of appeals relied in part on evidence submitted by the government in the forfeiture proceeding related to numerous other items in petitioner's inventory. *Alexander v. Thornburgh*, 943 F.2d at 829, 833. Plainly, the court of appeals *itself* viewed the goals of the order as preventing dissemination of these *other* items. But these items were neither the subject of the indictment, nor found obscene by the jury. Indeed, the district court admitted that it had made no such determination. Cert. Petn. App. 155. To paraphrase one district court: "To assume that the unindicted [magazines and] video tapes are obscene would be as improper as finding that all [twelve] of the indicted [magazines and] videotapes are obscene, despite the fact that the jury did not so find. The Government's attempt to transform a jury's finding that [seven items] are obscene into a judicial determination that the Defendant[] operate[d] an obscenity 'empire' . . . constitutes impermissible bootstrapping." *United States v. California Publishers Liquidating Corp.*, 778 F. Supp. 1377, 1388-89 (N.D. Tex. 1991), *appeal pending*.

hibiting future [expressive] conduct after a finding of undesirable present conduct.'" 445 U.S. at 331 n.3 (quoting three-judge court).

The forfeiture order—at variance with the fundamental meaning of the First Amendment—was entirely consistent with the "far-reaching" objective of RICO, namely prevention of future violations similar to those of the past by exterminating the offending enterprise once and for all, and preventing its reappearance in another form. *Russello v. United States*, 464 U.S. at 27. As the district court itself recognized in issuing the order, "Congress made clear its intent: a RICO enterprise is to be dismantled, root and branch." Cert. Petn. App. 159. RICO forfeiture was intended to "'eradicate organized crime,'" *Turkette*, 452 U.S. at 589 (quoting the preface to RICO) (emphasis added), and "'incapacitate, and . . . directly to remove the corrupting influence from the channels of commerce,'" *Russello*, 464 U.S. at 27-28 (quoting 116 Cong. Rec. 18955, remarks of Sen. McClellan) (emphasis added). This concept of eradication and incapacitation operates prospectively. As this Court held in *Turkette*, RICO's enhanced sanctions and new remedies are "preventive." 452 U.S. at 593 (rejecting reading of RICO forfeiture that "would ignore the preventive function of the statute"). RICO forfeiture is specifically designed to *prevent* the defendant from engaging in the future in those "racketeering" offenses in which it had engaged in the past.¹⁷

¹⁷ This Court has concluded that Congress included these new forfeiture provisions to break the economic power of organized crime. *Russello*, 464 U.S. at 22. See S.Rep. No. 91-617, 79 (1969) ("What is needed here . . . are new approaches that will deal not only with individuals, but also with the economic base through which those individuals constitute such a serious threat to the economic well-being of the Nation. In short, an attack must be made on their source of economic power itself."); 116 Cong. Rec. 35193 (Rep. Poff, manager of the bill in the House) (same); *id.* at 819 (Sen. Scott) ("purpose is to eradicate organized crime in the United States"); *id.* at 35199 (Rep. Rodino) ("a truly full-scale commitment to destroy the insidious power of organized crime

As applied to obscenity offenses, RICO's prophylactic purpose, design, and operation are chillingly effective: RICO prevents a speech enterprise—a bookstore, theater, etc.—from committing further obscenity violations *by preventing it from speaking at all*. This purpose and effect was expressly recognized in the report of the Attorney General's Commission on Pornography; the Commission *urged* prosecutors to use forfeiture to "literally put many pornographers *out of business*." 1 Final Report 464 (emphasis added). The Commission observed that RICO "provides an effective means to substantially eliminate obscenity businesses." *Id.* at 498 (emphasis added). See also *id.* at 433, 465, 472, 497 (recommending that governments enact statutes authorizing forfeitures even if two predicate offenses cannot be proved, in order to destroy sexually related businesses based upon a single obscenity conviction).

This Court, and Justices Stevens and Scalia in individual opinions, have acknowledged the obvious and troubling prophylactic design of obscenity-based RICO forfeiture. Writing for the Court in *Fort Wayne Books*, Justice White observed that "[i]t is incontestable that these [RICO] proceedings were begun to put an end to the sale of obscenity at the three bookstores named in the complaint." 109 S.Ct. at 929 (emphasis added). Writing separately in *Fort Wayne Books*, Justice Stevens stated that the design and effect of the analogous Indiana RICO forfeiture scheme was "extermination through elimina-

groups"); *id.* at 35300 (Rep. Mayne) (organized crime "must be sternly and irrevocably eradicated"); McClellan, *The Organized Crime Control Act (S.30) or Its Critics: Which Threatens Civil Liberties?*, 46 Notre Dame Law 55, 141 (1970) (explaining that RICO forfeiture "attacks the problem by providing a means of wholesale removal of organized crime . . . [and] prevention of their return") (emphasis added); S.Rep. No. 91-617, at 80 (forfeiture would "remove the leaders of organized crime from their sources of economic power. Instead of their positions being filled by successors no different in kind, the channels of commerce can be freed of racketeering influence.").

tion of the very establishments where sexually explicit speech is disseminated." *Id.* at 939. In *FW/PBS, Inc. v. City of Dallas*, Justice Scalia similarly recognized that RICO penalties are designed to "eliminat[e] the perceived evil [of] the very existence of sexually oriented businesses anywhere in the community that does not want them." 110 S.Ct. at 619 (Scalia, J., concurring and dissenting). The suppressive goal of the forfeiture at issue *here* is obvious from the government's own actions: after confiscating petitioner's inventory of presumptively protected materials, the government burned and crushed them.

This disabling, preventive purpose of RICO forfeiture distinguishes it, for First Amendment purposes, from traditional criminal sanctions such as fines and imprisonment. Imprisonment and fines are imposed for violation of numerous criminal laws, including obscenity, to accomplish several well-recognized purposes, such as deterrence and rehabilitation, that are wholly unrelated to suppressing speech. Any restraint such traditional sanctions might impose on expression is therefore incidental to their principal and intended objectives. But, as Congress recognized, RICO forfeiture, in sharp contrast, is *designed and intended* to go beyond traditional criminal penalties, and to extirpate an offending speech enterprise and its potential for further unlawful speech. The restraints imposed by RICO forfeiture are neither incidental nor limited. Indeed, it is precisely the power of *in personam* forfeiture to disable criminals from continuing their "pattern" of prior crimes that distinguished it from those traditional criminal penalties and commended it to Congress for inclusion in RICO. See *supra* at 5-8.

The RICO provisions at issue here are strikingly similar to the statutory scheme rejected by this Court in *Near*. In *Near*, the Minnesota legislature had determined that traditional criminal penalties under "penal statutes for libel [and obscenity] do not result in 'efficient repression or suppression' of libelous or obscene speech. 283 U.S. at 711. The injunctive "abatement"

remedy at issue in *Near* was the legislative response. *Id.* at 717. The similar reason for enactment of RICO was Congress' determination that "racketeering" activities (later including obscenity) could not be sufficiently repressed or suppressed by traditional criminal penalties. *Turkette*, 452 U.S. at 589. *In personam* forfeiture was the legislative response.

The predicate for restraining petitioner's future expression under RICO is the same as the predicate for the injunction struck down in *Near*—prior violation of criminal speech laws. The restraint imposed here by the district court, however, is in two ways far more inimical to First Amendment values. *First*, in this case, the court ordered *seizure* and *forfeiture* of expressive materials, for the purpose of their destruction. Physical seizure of expressive materials is "more repressive than an injunction preventing further sale," such as was at issue in *Near*. *A Quantity of Books v. Kansas*, 378 U.S. 205, 210 (1964) (plurality opn.). As this Court ruled in *Marcus v. Search Warrant of Property*, seizure is "an effective restraint—indeed the *most* effective restraint possible . . . because all copies on which the police could lay their hands were physically removed from the newsstands and from the premises of the wholesale distributor." 367 U.S. at 736 (emphasis added). The crushing and burning of presumptively protected materials in this case has maximized the suppressive effect of seizure.

Second, the injunction at issue in *Near* restrained defendants from publishing "a malicious, scandalous, or defamatory newspaper, as defined by law." 283 U.S. at 706. Even though this injunction permitted the defendant to publish a newspaper that did *not* contain libelous material, the *Near* Court struck it down because it violated the vitally important presumption that future speech is protected by the First Amendment until proven otherwise. *Id.* at 712-13. RICO—and the order at issue—go *much further* in their unlawful scope; to *ensure* no recurrence of the speech crime, they authorize the seizure and forfeiture of *all* expressive materials owned by the

speech enterprise, not just those that have been proved unprotected, and virtually all means of obtaining and selling *other* expressive materials.¹⁸ As a state supreme court has observed of an analogous measure:

This provision has the effect of sledgehammering the printing press, the camera, the projectors, all the tools of expression in every medium, so that there can be no future expression at all for one who transgresses by crossing the line from free speech to obscenity We can envision no more fatal defect of prior restraint

Gulf States Theatres v. Richardson, 287 So. 2d 480, 491 (La. 1973).¹⁹

C. The Formalistic Defenses Offered to Justify Obscenity-Based RICO Forfeiture Must Be Rejected.

The court of appeals apparently believed there was some talismanic distinction between prior restraints and

¹⁸ Thus, the remedies authorized by RICO clearly pose the dangers of prior restraints identified by Justice White in his separate opinion in *Vance*, 445 U.S. at 324: "through caprice, mistake, or purpose, the censor may forbid speech which is constitutionally protected." Indeed, RICO forfeiture makes *certain* that "mistakes" will be made by the thousands; to guarantee no obscenity is ever uttered, it restrains *all* speech by the defendant, whether constitutionally protected or not.

¹⁹ A broad so-called "content neutral" restraint on future speech, triggered by a past speech offense, is just as unlawful as a content-based restraint aimed at future unlawful speech. *Organization for a Better Austin v. Keefe*, 402 U.S. at 418-419 (holding unconstitutional an injunction "operat[ing] . . . to suppress, on the basis of previous publications, distribution of literature 'of any kind'"). The reason a narrow, content-based ban such as that condemned in *Near* is not permitted is that the government cannot presume in advance that future speech will be unprotected. Where, as here, the government bans *all* future speech on the presumption that *some* will be unprotected, its sweeping ban is *a fortiori* unconstitutional, and far more dangerous. Cf. *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546 (1975). See *California Publishers Liquidating Corp.*, 778 F. Supp. at 1384 ("to enter an order of forfeiture of materials not found to be obscene would do violence to the First Amendment's protection from prior restraint").

"criminal penalties," and relied upon this Court's decision in *Arcara v. Cloud Books, Inc.*, 478 U.S. 697 (1986), for that proposition. *Alexander v. Thornburgh*, 943 F.2d at 834. See also *Adult Video Ass'n v. Barr*, 960 F.2d 781, 789 (9th Cir. 1992); *United States v. Pryba*, 900 F.2d 748, 753 (4th Cir.), *cert. denied*, 111 S.Ct. 305 (1990). That formalistic distinction has no place in First Amendment jurisprudence.

Arcara is entirely inapposite. The padlocking order upheld there merely closed a bookstore as a public health measure to prevent continued prostitution and other *non-speech* activity on the premises. Distinguishing *Near*—where the injunction had been triggered by past libels—the *Arcara* Court emphasized that "the imposition of the closure order" had "nothing to do with any expressive conduct at all." 478 U.S. at 705 n.2. Thus, in the *Arcara* Court's view, the fact that expressive materials were involved had been a fortuity, and the impact on speech activities was only incidental. The Court held that the government may close a bookstore for a year based upon "unlawful conduct *having nothing to do with books or other expressive activity*." *Id.* at 707 (emphasis added). See *id.* at 705 (bookstore may be closed for nonspeech offenses such as prostitution, "Fire Code violations, or health hazards from inadequate sewage treatment"). It was implicit in the Court's analysis, as Justice O'Connor observed, that use of a nuisance statute to "clos[e] down a book store because it sold indecent books . . . would clearly implicate First Amendment concerns." *Id.* at 708 (concurring opn.). The First Amendment constrains government regulation when, as here, "a significant expressive element . . . drew the legal remedy in the first place." *Id.* at 706 (maj. opn.).

Like the restraint in *Near*, and unlike the closure in *Arcara*, the present order restrains future speech based solely upon a finding that the enterprise has engaged in instances of unlawful *speech* in the past. Application of RICO forfeiture in obscenity cases is predicated on *ex-*

pressive rather than nonexpressive activities (*i.e.*, expression “drew the legal remedy,” *id.*). Moreover, like the restraint in *Near* and unlike the closure in *Arcara*, the objective of the present order is to prevent future speech crimes—not future acts of prostitution or other nonspeech offenses. Although an order premised on and directed at preventing nonspeech offenses may not raise First Amendment concerns whatever its incidental effects on speech, forfeiture predicated on a speech crime is based upon the forbidden presumption that future speech will be unlawful, the hallmark of a prior restraint. See *People v. Sequoia Books*, 127 Ill.2d 271, 537 N.E.2d 302, 309 (1989), *cert. denied*, 110 S.Ct. 835 (1990). Cf. *Gulf States Theatres*, 287 So.2d at 491 (availability of padlocking and destruction of fixtures as penalty for gambling or prostitution offenses “affords no basis for analogy with the suppression and regulation of speech”).²⁰

²⁰ This crucial distinction undergirds *Arcara* itself, 478 U.S. at 706, and demonstrates the fallacy of the contention that applying prior restraint doctrine in this context would permit criminals to “launder” their illegally obtained profits by investing in bookstores. See *Alexander*, 943 F.2d at 834 (advancing this erroneous argument); *Pryba*, 900 F.2d at 755 (erroneously claiming that prior restraint “reasoning would allow the Columbian drug lords to protect their enormous profits by purchasing the New York Times or the Columbia Broadcasting System”); *Adult Video Ass’n*, 960 F.2d at 790 (making same erroneous argument); *Opp*, Cert. at 6 (erroneously claiming that “if bookstores, newsstands, publishing houses, and the like were immune from forfeiture, drug lords and other criminals would waste no time in investing in those businesses and insulating their criminal proceeds from seizure”). These dire predictions are specious. Prior restraint doctrine precludes forfeitures designed to disable the defendant from committing future speech offenses. See *California Publishers Liquidating Corp.*, 778 F. Supp. at 1393. Under the reasoning of *Arcara*, forfeiture designed to prevent narcotics trafficking and gambling does not implicate prior restraint doctrine because the goal is to restrain commission of nonspeech offenses. Cf. *Fort Wayne Books*, 109 S.Ct. at 939 (“Seldom will First Amendment protections have any relevance to the sanctions that might be invoked against an ordinary commercial establishment.”) (Stevens, J., concurring and dissenting).

Nor can the RICO forfeiture imposed in this case be insulated from First Amendment scrutiny by invoking the label “criminal penalty.” The “standard of review is determined by the nature of the right assertedly threatened or violated rather than by the power being exercised or the specific limitation imposed.” *Schad v. Borough of Mt. Ephraim*, 452 U.S. 61, 68 (1981) (zoning law prohibiting “live entertainment” including nude dancing, subject to strict scrutiny). As this Court recently affirmed in *Fort Wayne Books*, “[a]s far back as the decision in *Near* . . . , this Court has recognized that the way in which a restraint on speech is ‘characterized’ . . . is of little consequence.” 109 S.Ct. at 929. See *Near*, 283 U.S. at 708 (prior restraint doctrine looks “to substance and not to mere matters of form”); *Bantam Books, Inc. v. Sullivan*, 372 U.S. at 67 (“We are not the first court to look through forms to the substance . . .”). A court assessing whether a governmental action is an unconstitutional prior restraint must “cut through mere details of procedure” and evaluate its “operation and effect” upon free speech. *Near*, 283 U.S. at 708, 713.

An argument similar to this “criminal penalty” argument was made and rejected in *Near*. In dissent, Justice Butler sought to justify the injunction there as merely “prescrib[ing] a remedy” for a proven wrong. 283 U.S. at 735. The dissent argued that the injunction did “not operate as a *previous* restraint on publication within the proper meaning of that phrase” because it restrains “only . . . continuing to do what has been duly adjudged to constitute a nuisance.” *Id.* (emphasis in original). Because the decree was imposed to prevent further unprotected expression, Justice Butler argued any claimed “similarity” to a “previous restraint” was “fanciful.” *Id.* at 736 (emphasis deleted). Chief Justice Hughes and the majority of the *Near* Court specifically rejected this argument as “inconsistent with the reason that underlies the [First Amendment] privilege.” *Id.* at 721; see *id.* at 720. The statute’s object, the Court recognized, was “not punishment, in the ordinary sense, but suppression of the

offending newspaper or periodical." *Id.* at 710. As a district court recently concluded: "The First Amendment's safeguards against prior restraint of expression do not vanish merely because a criminal statute is used to silence printing presses." *California Publishers Liquidating Corp.*, 778 F. Supp. at 1393.

To uphold eradication of speech enterprises as "punishment" for engaging in past unprotected expression would destroy prior restraint doctrine, the centerpiece of First Amendment jurisprudence. *Any* restraint on future expression would survive on this theory if imposed after a criminal trial. This Court's rulings in *Near* and *Vance*, for example, could be evaded by the simple expedient of changing the rubric under which the injunctions in those cases were imposed. Indeed, this Court's ruling in *Fort Wayne Books* could similarly be evaded.²¹ If the label "criminal punishment" conferred immunity from the First Amendment, legislatures and municipal governments would be free to punish speech-related crimes with "banning orders." An individual convicted of burning his draft card, as in *United States v. O'Brien*, 391 U.S. 367 (1968), or convicted of violating an injunction against street demonstrations, as in *Walker v. City of Birmingham*, 388 U.S. 307 (1967), could be banned from participating in *any* future political demonstrations as "punishment" for the past transgression. Dr. Martin Luther King could have been prohibited from conducting any future civil rights marches as a "penalty" for marching without a permit in Birmingham. Following this

²¹ In *Fort Wayne Books*, the pre-trial seizure was based upon past obscenity convictions and probable cause to believe a RICO "pattern" and "enterprise" could be proved in the forthcoming RICO trial. 109 S.Ct. at 929. See also *Near*, 283 U.S. at 706 (defendant had committed seditious libel); *Vance*, 445 U.S. at 331 (injunction under challenged law would be based on "showing that obscene films had been exhibited in the past"). Under the "criminal penalty" theory, the *Fort Wayne Books* seizure could have been accomplished by providing fewer protections for speech, for example, by authorizing the seizure as "punishment" for the prior convictions alone. *Fort Wayne Books* rejects such formalistic evasions of prior restraint doctrine.

reasoning, if a newspaper published one reckless libel, one state secret, or one unfair use of a copyright-protected work, the First Amendment would permit the government to forfeit as a "criminal penalty" not only the printing presses but the entire publishing business. Such results are inconceivable, and the prior restraint imposed in this case is similarly unconstitutional. However the restraint is denominated, and however the determination of prior speech offenses is made, government may not constitutionally impose a far-reaching ban on *future* speech because a defendant has been found to have engaged in impermissible speech activity in the past.

Finally, RICO forfeiture proponents argue that the unprecedented, draconian sanction is not an unconstitutional prior restraint because "petitioner is free to engage in the production and distribution of any First-Amendment protected material after the forfeiture." Opp. Cert. at 7. See also *Adult Video Ass'n v. Barr*, 960 F.2d at 790. This argument ignores reality and misperceives prior restraint doctrine. Like the unconstitutional schemes in *A Quantity of Books* and *Marcus*, the order at issue in this case imposes "the most effective restraint possible" on the dissemination of *particular* materials. All the expressive materials in petitioner's inventory have been seized, forfeited, and destroyed. Petitioner certainly cannot disseminate those presumptively constitutional materials under any circumstances; they have been incinerated. Furthermore, the present order is specifically designed to deprive petitioner of the economic capacity to continue his business or to open a new one—and it has been successful. The patently unconstitutional design, operation and effect of RICO forfeiture in the obscenity context is to prevent virtually *all* of petitioner's future speech to ensure that none is obscene.

II. THE RICO FORFEITURE PROVISIONS VIOLATE THE FIRST AMENDMENT BY CONFERRING UNBRIDLED DISCRETION ON PROSECUTORS, AND POSE AN INTOLERABLE RISK OF SELECTIVE CENSORSHIP OF PROTECTED EXPRESSION.

As discussed above, RICO forfeiture's statutory purpose of preventing future *obscenity* violations is impermissible; even more ominous, however, is RICO forfeiture's potential for improper use to suppress future *protected* expression prosecutors find objectionable. The Justice Department concedes that RICO forfeiture "provides potential for abuse," because prosecutors have unbridled discretion to selectively charge RICO. RICO Manual for Federal Prosecutors, 9-110A.110 at 138. When obscenity provides the predicate offense, the discretionary process of charging RICO "furnishes a convenient tool for harsh and discriminatory enforcement by local prosecuting officials, against particular groups deemed to merit their displeasure." *Kolender v. Lawson*, 461 U.S. 352, 360 (1983) (internal quotations omitted).²² Because the purpose and effect of RICO forfeiture in the obscenity context is the dismantling of the entire speech "enterprise," there is a significant danger that prosecutors in many cases will use obscenity-predicated RICO charges to destroy expressive businesses because those prosecutors disapprove of the businesses' protected speech. Such a risk of deliberate suppression of protected speech "the First Amendment will not tolerate." *Fort Wayne Books*, 109 S.Ct. at 939 (Stevens, J., concurring and dissenting).

In this case, the government could have charged petitioner with obscenity violations, 18 U.S.C. §§ 1461-1465, and *not* added obscenity-predicated RICO charges. Indeed, the government frequently indicts on multiple obscenity

²² Obscenity-based RICO forfeiture thus poses the same threat to First Amendment freedoms that Justice Kennedy feared with regard to explicitly content-based sanctions: that governments "may censor speech whenever they believe there is a compelling justification for doing so." *Simon & Schuster*, 112 S. Ct. at 513 (1991) (concurring opn.).

counts without invoking RICO.²³ Without a RICO conviction, however, the government could not have ensured forfeiture of petitioner's thirteen bookstores and video stores, wholesale distribution business, and all the assets related to those expressive businesses.²⁴

No standards meaningfully guide the prosecutorial decision whether to supplement charges on the predicate offenses with RICO charges. The RICO statute itself provides *no* standards guiding this decision. The Department of Justice Handbook is perfectly standardless: RICO charges are appropriate "when[, *inter alia*,] a substantial prosecutive interest will be served" by forfeiture. 9-110.311(D). The RICO Manual for federal prosecutors likewise provides no guidance: RICO charges are proper when "use of RICO would provide a reasonable expectation of forfeiture which is proportionate to the underlying criminal conduct." 9-110A.100 at 139-40.²⁵

²³ E.g., *United States v. PHE, Inc.*, 965 F.2d 848 (10th Cir. 1992); *United States v. Easley*, 942 F.2d 405 (6th Cir. 1991).

²⁴ Obscenity convictions may entail forfeiture pursuant to 18 U.S.C. § 1467. In *California Publishers Liquidating Corp.*, the court observed that "the RICO forfeiture statute, 18 U.S.C. § 1963, and Section 1467, although both providing for criminal forfeiture, are not at all the same." 778 F.Supp. at 1391-92. (Refusing "to rely on analogies to RICO in its interpretation and application of Section 1467"). Thus, while constitutional problems may inhere in the obscenity forfeiture statute, in its decision issued in October, 1991, the district court in *California Publishers Liquidating Corp.* noted that the government could not identify one case in which a violation of federal obscenity laws alone resulted in forfeiture of an entire business. 778 F. Supp. at 1387 n.10 (refusing to impose such extensive forfeiture under Section 1467).

²⁵ Given the gross disparities between the value of the materials deemed obscene and the value of the property forfeited in two reported federal RICO obscenity cases, it is difficult to believe this "standard" provides *any* limit on federal prosecutors' discretion. Cert. Petn. App. 154-55 (*Alexander* court in forfeiture proceeding observing that "[p]lainly, there is little chance that the sale of these few videos and magazines [found obscene] could generate such massive income to the enterprise," nearly \$9 million, which the court nevertheless ordered forfeit); *Pryba*, 900 F.2d at 753 (uphold-

These are not "narrowly drawn, reasonable and definite standards" containing "objective factors." *Forsyth County v. Nationalist Movement*, 112 S.Ct. 2395, 2402-3 (1992). See also *Niemotko v. Maryland*, 340 U.S. 268, 271 (1951) (holding that discretionary authority over future, presumptively protected expression must be guided by "narrowly drawn, reasonable and definite standards"). This Court has made clear that when, as with invocation of RICO, a government official's decision regarding free expression "involves appraisal of facts, the exercise of judgment, and the formation of an opinion, . . . the danger of censorship and of abridgement of our precious First Amendment freedoms is too great to be permitted." *Forsyth County*, 112 S.Ct. at 2401-2 (internal quotations and citations omitted).

Deciding whether the forfeiture of an enterprise serves a "significant prosecutive interest" or will be "proportionate" to the crimes committed invites prosecutors to use their own *subjective* standards regarding the gravity of the offenses committed and the societal value of the enterprise involved. Thus, prosecutors could decide that obscenity-predicated RICO forfeiture is appropriate in a case involving an adult bookstore because they believe (1) inoffensive erotic books have no social value; (2) constitutionally protected erotic books cause moral or other harms; or (3) ridding the community of constitutionally protected sexually oriented materials will improve "moral" standards. At the same time, using subjective values, prosecutors could decide the same remedy to be inappropriate in a case involving a general bookstore that happened to sell seven books that a jury later found to be obscene.²⁶ Alternatively, in an effort to drive erotica out

ing forfeiture of 12 businesses doing \$2 million annually based on \$105.30 worth of sales and rentals of items found obscene).

²⁶ The government might, for example, prosecute the Cincinnati museum under obscenity laws for displaying Robert Mapplethorpe's works, but not bring RICO charges that would result in forfeiture of the balance of the museum's collection and the museum itself, yet seek forfeiture when an adult bookstore sold the same items.

of "mainstream" outlets and restrict them to adult districts, prosecutors could choose to invoke RICO forfeiture against the general bookstore but *not* against adult businesses;²⁷ or they could use the weapon of forfeiture to target protected erotic materials expressing a disfavored view of the relationship between the sexes or human sexuality. See *American Booksellers Ass'n v. Hudnut*, 771 F.2d 323 (7th Cir. 1985), *aff'd* 475 U.S. 1001 (1986). The point is that RICO confers on government officials an extraordinary opportunity to "discriminate based on the content or viewpoint of speech by suppressing disfavored speech or disliked speakers." *City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 759 (1988). Indeed, the "standards" the government has adopted—which are tied to the effectiveness of RICO forfeiture in eradicating the "criminal enterprise"—affirmatively encourage such discrimination.²⁸

In this way, the RICO forfeiture scheme works like a licensing system: in deciding whether to seek RICO forfeiture, the prosecutor effectively determines whether a speech enterprise will be permitted to speak in the future. This Court has "consistently condemned licensing systems which vest in an administrative official discretion to grant or withhold a permit" necessary for the exercise of free expression. *Kunz v. New York*, 340 U.S. 290, 294

²⁷ It is notable, for example, that most of the "adult" videos are disseminated in this country by retailers whose main body of inventory is general material.

²⁸ This Court cannot merely presume that prosecutors will act in good faith and refrain from engaging in censorship of constitutionally protected, albeit officially-disfavored material. See *Lakewood*, 486 U.S. at 770 (the presumption that the mayor will act in good faith "is the very presumption that the doctrine forbidding unbridled discretion disallows"). Moreover, whether prosecutors in fact apply legitimate, content-neutral standards in making their decisions in some cases is irrelevant. See *Forsyth County*, 112 S.Ct. 2403 & n.10. The potential for censorship and content-based discrimination alone renders the statute invalid. *Id.*

(1951).²⁹ Even though such statutes may be facially neutral, the vague, broad standards contained within the statutes invite selective enforcement and censorship of unpopular views. *Lakewood*, 486 U.S. at 757; *Cox v. Louisiana*, 379 U.S. 536, 555-57 (1965). These cases establish the fundamental principle that "[t]he First Amendment prohibits the vesting of such unbridled discretion in a government official." *Forsyth County*, 112 S.Ct. at 2403.

The RICO scheme also presents the defects inherent in an unconstitutionally vague law. Due to the lack of restraints in its application, police and prosecutors may use it to suppress disfavored protected speech and unpopular points of view.³⁰

In *Fort Wayne Books*, Justice Stevens recognized the obvious danger of censorship inherent in post-conviction RICO forfeiture, observing that "the longstanding justification for suppressing obscene materials has been to prevent people from having immoral thoughts." 109 S.Ct. at 936 (footnote omitted). "Sexually explicit books and movies . . . are commodities the State does want to exterminate." *Id.* at 939. He concluded that "the Federal RICO law . . . furnishes prosecutors with 'drastic methods' for curtailing undesired activity." *Id.* at 937.

²⁹ See, e.g., *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 225-226 (1990) (holding that licensing scheme for sexually oriented businesses violated the First Amendment); *Lakewood*, 486 U.S. at 763 (striking down a newsrack permit system which placed discretion in the mayor); *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 150 (1969) (striking down a permit scheme for parades or processions); *Staub v. City of Baxley*, 355 U.S. 313, 322 (1958) (striking down a permit scheme for solicitation of members for organizations).

³⁰ See, e.g., *Kolender v. Lawson*, 461 U.S. at 360; *Smith v. Goguen*, 415 U.S. 566, 575 (1974); *Conates v. City of Cincinnati*, 402 U.S. 611, 616 (1971); *Cantwell v. Connecticut*, 310 U.S. 296, 308 (1940) (holding that vague "breach of the peace" statutes violate the First Amendment because they "leav[e] to the executive and judicial branches too wide a discretion in its application").

[RICO] allow[s] prosecutors to cast wide nets and seize, upon a showing that two obscene materials have been sold, or even just exhibited, all a store's books, magazines, films, and videotapes—the obscene, those nonobscene yet sexually explicit, even those devoid of sexual reference.

Id. Thus, RICO forfeiture permits prosecutors "to silence immoral speech and repress immoral thoughts," without regard to whether the materials suppressed are protected or unprotected. *Id.* at 938.³¹ See also *FW/PBS, Inc. v. City of Dallas*, 110 S.Ct. at 619 (Scalia, J., concurring and dissenting). RICO forfeiture is unconstitutional because it "arm[s] prosecutors not with scalpels to excise obscene portions of an adult bookstore's inventory but with sickles to mow down the entire undesired use." *Fort Wayne Books*, 489 U.S. at 939 (Stevens, J., concurring and dissenting).³²

³¹ Justice Stevens concluded that the purpose and effect of Indiana's parallel RICO statute was "to expand beyond traditional prosecution of legally obscene materials that, though constitutionally protected, have the same undesired effect on the community's morals as those that are actually obscene." *Id.* at 938. The Attorney General's Commission on Pornography—the same body that advocated use of RICO forfeiture in obscenity cases—clearly viewed as "harmful" not only obscenity but also "much material that may not be legally obscene, and . . . that would not generally be considered 'pornographic.'" 1 Report at 302.

³² Cf. *FW/PBS*, 110 S. Ct. at 619 (RICO's "draconian sanctions for obscenity" create great risks for all who would "flirt with the sale of pornography") (Scalia, J., concurring and dissenting).

CONCLUSION

For the foregoing reasons, the decision of the Eighth Circuit Court of Appeals should be reversed.

Respectfully submitted,

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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1991

Ferris J. Alexander, Sr.

Petitioner,

v.

United States Of America

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF OF MORALITY IN MEDIA, INC. AS AMICUS
CURIAE IN SUPPORT OF THE UNITED STATES

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INTEREST OF AMICUS

Morality in Media, Inc., as Amicus Curiae, files this brief in support of the United States in this case, which is before this honorable Court on the merits under the provisions of Rule 42(2). The written consents of the petitioner and respondent have been requested and all parties have consented thereto in writing. Copies of these consents are being filed with this Court concurrently with this brief.

Morality In Media is a New York not-for-profit, interfaith, charitable corporation, organized in 1968 for the purpose of combatting the distribution of obscene material in the United States. This organization, now national in scope, has affiliates and chapters in various states of the Union. Its Board of

Directors and National Board are composed of prominent businessmen, clergy and civic leaders. Its national headquarters is located at 475 Riverside Drive, New York, New York 10115.

The Founder and President of Morality In Media (until his death in 1985) was Reverend Morton A. Hill, S.J. In 1968, Father Hill was appointed to the President's Commission on Obscenity and Pornography. He, along with Doctor Winfrey C. Link, produced the "Hill-Link Minority Report of the Presidential Commission on Obscenity and Pornography." The "Hill-Link Minority Report" was cited by this honorable Court in Kaplan v. California, 413 U.S. 115, 120 note 4 (1973) and in Paris Adult Theatre I v. Slaton, 413 U.S. 49 at 58, notes 7 and 8 (1973).

More recently Morality In Media has participated as Amicus in Federal Communications Commission v. Pacifica Foundation, 438 U.S. 726 (1978); New York v. Ferber, 458 U.S. 747 (1982); Brockett v. Spokane Arcades, Inc., 105 S.Ct. 2794 (1985); Fort Wayne Books, Inc. v. State of Indiana, 489 U.S. 46 (1989) and Action for Children's Television v. FCC, No. 91-883, review denied, 60 L.W. 3599 (1992).

Morality In Media has a special interest in this particular case because it was the organization which suggested obscenity as a predicate act under the RICO statute and also suggested appropriate legislative language to accomplish that amendment.

Morality In Media is filing a brief in this matter in support of the United States because it believes that the

decision in this case will have a direct and lasting effect on the ability of the federal government to effectively wipe out the evil of obscenity.

It is the belief of Morality In Media that its brief contains relevant matter that may not be brought to the attention of the Court by the parties.

SUMMARY OF ARGUMENT

Morality In Media contends that the mere fact that the "enterprise" involves a so-called "First Amendment Business," which can under RICO be forfeited or dissolved after trial, should not invalidate or restrict the scope of RICO's post-trial forfeiture penalty when "Obscenity" is a predicate offense.

If post-conviction forfeiture is not permitted or is to be greatly restricted in a RICO-obscenity case, then a

criminal's so-called "First Amendment" business and corporation should also be insulated in whole or part from RICO's post-conviction forfeiture penalty no matter what the predicate crime.¹

Morality In Media, Inc. reminds this honorable Court that a sole proprietor of a "First Amendment" business can be incarcerated for long periods of time under existing federal and state obscenity laws, effectively precluding him or her from engaging in that First Amendment business.² Amicus further points out that

¹ This honorable Court, did, it is noted, deny, certiorari at 459 U.S. 825 (1982) to United States v. Thevis, 474 F.Supp. 134 (N.D. Ga. 1979), aff'd, 665 F.2d 616 (11th Cir. 1982) where the "enterprise" had as its purpose a "pornography business."

² Cf. Arcara v. Cloud Books, Inc., 106 S.Ct. 3172, 3177 (1986) where this Court said "A thief who is sent to prison might complain that his First Amendment right to speak in public places has been infringed."

the RICO laws are on the books not as a restraint on future First Amendment activity, but as a form of punishment for engaging in a past "pattern" of racketeering activity.³ Near v. Minnesota is therefore not violated. Amicus further demonstrates that analogous decisions of this Honorable Court may be viewed as precedents for upholding post-conviction forfeiture in RICO-obscenity cases. Finally, Amicus demonstrates that post-conviction RICO forfeiture does not violate the Eighth Amendment.

³ Cf., State ex rel Kidwell v. U.S. Marketing, Inc., 631 P.2d 622, at 628, (Idaho Sup. Ct. 1981), appeal dismissed pursuant to Rule 53, 455 U.S. 1009 (1982).

ARGUMENT

I

THE RICO LAW DOES NOT AMOUNT TO A PRIOR RESTRAINT OF PROTECTED EXPRESSION, IS NOT OVERBROAD AND IS NOT VIOLATIVE OF THE FIRST AMENDMENT.

The issue of the legality of a "prior restraint" reached this honorable Court in the landmark case of Near v. Minnesota, 283 U.S. 697, 707-708 (1931). On that issue, that Court said:

"It is no longer open to doubt that the liberty of the press, and of speech, is within the liberty safeguarded by the due process clause of the Fourteenth Amendment.... In maintaining this guaranty, the authority of the State to enact laws to promote the health, safety, morals and general welfare of its people is necessarily admitted. The limits of

the sovereign power must always be determined with appropriate regard to the particular subject of its exercise.... Liberty of speech, and of the press, is also not an absolute right, and the State may punish its abuse."

The Near Court continues at 283 U.S. 713:

"In determining the extent of the constitutional protection, it has been generally, if not universally, considered that it is the chief purpose of the guaranty to prevent previous restraints upon publication. The struggle in England, directed against the legislative power of the licenser, resulted in renunciation of the censorship of the press. The liberty deemed to be established was

thus described by Blackstone:

'The liberty of the press is indeed essential to the nature of a free state; but this consists in laying no previous restraints upon publication [Emphasis Is The Court's] and not in freedom from censure for criminal matter when published. [Emphasis Supplied] Every free-man has an undoubted right to lay what sentiments he pleases before the public; to forbid this, is to destroy the freedom of the press; but if he publishes what is improper, mischievous or illegal, he must take the consequence of his own temerity.'

The Near Court, continuing at 283

U.S. 714, 715, quotes Patterson v. Colorado:⁴

"The main purpose of such constitutional provisions is "to prevent all such previous restraints upon publications" as have been practiced by other governments" [Emphasis in Original] and they do not prevent the subsequent punishment of such as may be deemed contrary to the public welfare.'" [Emphasis Supplied]

The Near Court continues at 283 U.S. 716;

"The protection even as to previous restraint is not absolutely unlimited.... [T]he primary requirements of decency may be enforced against obscene

⁴ 205 U.S. 454, at 462 (1907).

publications." [Emphasis Supplied]

It is interesting to note that in a dissenting opinion, Justice Butler, with whom Justices Van Devanter, McReynolds and Sutherland concurred⁵, states that the majority opinion:

"Seems to concede that under clause (a) of the Minnesota law the business of regularly publishing and circulating an obscene periodical may be enjoined as a nuisance."

[Emphasis Supplied]

If Near means that such a business may be enjoined, a fortiori, a Defendant convicted of racketeering with obscenity as the predicate crime, may, under Near be punished after the fact by a forfeiture of assets. Near is of no benefit to the petitioner.

⁵ 283 U.S. at 737.

Clearly, RICO forfeiture is not designed as a prior restraint, but is designed as punishment for past offenses. Contrary to the censorship decried in Near v. Minnesota, there is no administrative or legislative⁶ prior restraint upon any particular publication; nor is there any particular subsequent restraint of any particular publication. The statute, as distinguished from the Near case situation, is "content neutral," relating to the predicate crimes which may trigger its remedies. It is not a statute that refers to the suppression of a newspaper or periodical, but "punishment in the ordinary sense" (cf., Near at 711 and 715).

⁶ The dissenting Justices in Near argued that the doctrine of prior restraint, as it came to us from England and in the Blackstone quotation, supra, was restricted to Administrative prior restraint (283 U.S. 733).

It is also significant to note that the Near v. Minnesota majority opinion, as interpreted by the dissenting justices, apparently excepted enjoining a nuisance from the concept of prior restraint-- "The business of regularly publishing and circulating an obscene periodical may be enjoined as a nuisance."⁷ Near also puts on a par "enforcing concepts of decency against obscene publications" with the right of the government "to prevent actual obstruction of its recruiting service or the publication of the sailing dates of transports or the number and location of troops,"⁸ indicating the seriousness of this crime and, if anything, allowing expanded, not restricted remedies.[Emphasis Supplied]

⁷ Note 5, supra

⁸ 283 U.S. 716

If we examine the intent and focus of Post-Conviction RICO forfeiture in Obscenity and other cases, it is obvious that the intention of the statute is to punish by seizure of assets, not to suppress publication by a form of invidious prior restraint now or in the future. Does the fact that the assets seized may be communicative per se change the picture? The answer would have to No! Otherwise every time a creditor of a first amendment businesses, such as the IRS, seizes the inventory or fixtures or real estate of such a business it could be met with the objection that this amounts to a "prior restraint" by the government of future publications or distribution.

Obviously, the issue is not whether the assets to be seized are "expressive" but rather "for what reason" were the

assets forfeited. If the reason is to suppress freedom of speech or the press, the forfeiture is invalid. If it is to punish a criminal for violating a valid law, it is simply a form of punishment. It is clear that in Near v. Minnesota the object (purpose) of the statute was "not punishment in the ordinary sense, but suppression of the offending newspaper or periodical." The legislative history of RICO, however, "clearly demonstrates that...[it] was intended to provide new weapons of unprecedented scope for an assault upon organized crime and its economic roots." Russello v. United States, 464 U.S. 16, 26 (1983). "The major purpose of Title IX...was to address the infiltration of legitimate business by organized crime," United States v. Turkette, 452 U.S. 576, 591 (1981).

II

WHERE SUFFICIENT REASON EXISTS THE CLOSURE OF A FIRST AMENDMENT BUSINESS HAS BEEN AUTHORIZED BY THIS HONORABLE COURT AND OTHER COURTS.

There is no legal principle established in law that prevents the closing of a so-called "First Amendment" business. The law does not surround such a business with an impregnable shield. The First Amendment is not violated by a carefully tailored law designed to punish persons who abuse liberty. As was said in Near v. Minnesota:

"In maintaining this guaranty, the authority of the State to enact laws to promote the health, safety, morals and general welfare is necessarily admitted." (283 U.S. 707) "It is recognized that punishment for the abuse of the liberty afforded to the press is

essential to the protection of the public" (283 U.S. 715). [Emphasis Supplied]

In Arcara v. Cloud Books, Inc., 106 S.Ct. 3172, 3177 (1986), this honorable Court stated:

"We must reject the Court of Appeals' reasoning, analogizing the closure order sought in this case to an unconstitutional prior restraint under Near v. Minnesota.... The closure order sought in this case differs from a prior restraint in two significant respects. First, the order would impose no restraint at all on the dissemination of particular materials, since respondent is free to carry on his bookselling business at another location even if such locations are

difficult to find.⁹ Second, the closure order sought would not be imposed on the basis of an advance determination that the distribution of particular material is prohibited --indeed the imposition of the closure order has nothing to do with any expressive conduct at all."

There are similarities between Arcara and the case at bar. The defendant is free to carry on his "adult" book store and related activities at other locations, especially if "new" money were utilized and if the new locations avoided violating the law and in particular the Obscenity Law. The case also falls squarely into

⁹ The implication for this honorable Court here is that the First Amendment is not offended even if it takes a while to find a new location. This action was taken over the objection of the dissenting judges to the effect that "The Court improperly attempts to shift to the bookseller the responsibility of finding an alternative site" (106 S.Ct. 3180).

the second Arcara test (which by itself is sufficient to rebut a claim of prior restraint) in that the forfeiture and the RICO statute are "content neutral" and the determination for forfeiture was not imposed "on the basis of an advance determination that the distribution of particular materials is prohibited."

We also draw the attention of the Court to Avenue Book Store v. City of Tallmadge¹⁰ where this honorable Court denied certiorari to the Ohio Court of Appeals over the stated objections of dissenting Justices. In that case, the Ohio Court of Appeals stated that:

¹⁰ 459 U.S. 997 (1982). In Avenue Book the Ohio Court held that the injunction did not "carry with it any of the dangers of a censorship system." It said it did not constitute a prior restraint because "no punishment will be imposed until it is proven that obscene material was indeed involved." (459 U.S. at 997). (See also cases on both sides involving padlocking outlined in the Dissent in that case at 998-999).

"Defendant is enjoined from utilizing the rear section of the store for the exhibition, display or sale of materials which display or depict sexual conduct (activity) that is obscene."

Other cases involving First Amendment businesses, where the state action was upheld, include Art Theatre Guild, Inc. v. Ewing, 421 U.S. 923, 44 L.Ed.2d 82 (1975), dismissing an appeal from the Ohio Supreme Court, which held that a one year theatre closure provision was valid. The United States Supreme Court dismissed the appeal "For want of a substantial federal question."¹¹

Young v. American Mini Theatres,¹²

¹¹ Under Hicks v. Miranda, 422 U.S. 332 (1975) such a dismissal is a ruling "On the Merits."

¹² 427 U.S. 50, 62 (1976).

held that zoning laws on adult entertainment businesses do not constitute impermissible prior restraints, noting that there is "No claim that...the viewing public is unable to satisfy its appetite for sexually explicit fare. [T]he market for this commodity is essentially unrestrained."

There are lower court cases that recognize that "padlocking" of a motion picture theater is not an invidious prior restraint. A leading case is State ex rel Kidwell v. U.S. Marketing, Inc., 631 P.2d 622 (Idaho Supreme Court 1981), appeal dismissed under Rule 53, 455 U.S. 1009 (1982). The opinion of the Idaho Supreme Court in that case, in which a one year padlock was imposed, is especially enlightening and applicable. The Idaho Supreme Court there said at 631 P.2d 626:

"The phrase 'prior restraint' is not a self-wielding sword. Nor can it serve as a talismanic test. ...What is needed is a pragmatic assessment of its operation in particular circumstances.... Kingsley Books v. Brown, 354 U.S. at 441-42."

Continuing at 627:

"By way of example, if a bookseller, having fallen behind on his property taxes, loses his bookstore at a tax sale, he will not be heard to complain that the state has imposed an unlawful prior restraint on his bookselling activities. If that same bookseller is convicted of a crime of distributing obscene

materials, he may be imprisoned, and yet he will not be heard to complain that his incarceration constitutes a prior restraint upon his ability to disseminate protected speech, even though it is quite clear that it will have that effect."¹³ [Emphasis Supplied]

The Idaho Supreme Court continued at 627:

"There are a number of distinctions between the Near case and the previously cited hypothetical examples, not the

¹³ The point here is that while in "operation and effect" the incarceration deprives the defendant of the ability to conduct a First Amendment business, it is, in "operation and effect" not a restraint of First Amendment activities. It is a restraint on the defendant's participation therein.

least of which is the fact that Near dealt with speech critical of public officials rather than speech of a sexual nature. Most significantly, however, the Near injunction against prospective publication was based on the content of such publication. [Emphasis Supplied] In the case of tax sales and imprisonment for violation of criminal obscenity statutes, the incidental restraint on future expression is not based on the content of that expression." [Emphasis Supplied]

At page 627, footnote 8, the Idaho Supreme Court (citing cases) states:

"The typical prior restraint case deals with the

government's effort to censor future expression based on its content."

It then, at page 628, goes on to say:

"The one-year forfeiture provision of the Idaho moral nuisance statute avoids the particular noxious specter of content control. Like a tax sale, the forfeiture is directed strictly against property, apart from the content of any expression contained therein. And like imprisonment for a criminal obscenity transgression, the forfeiture is intended to penalize past distributions of illegal and unprotected obscenity. The legislature could just as easily

have imposed a fine or other property-related penalty. Instead the legislature chose to punish the violator by temporarily depriving him of the property which was used in committing the violation."¹⁴

The Idaho Supreme Court, at page 68, then gives us the rationale for forfeiture statutes as follows:

"The purpose of statutory forfeitures is obvious: to punish and to deter. [F]orfeitures punish 'by

¹⁴ "The state's authority to impose property related sanctions in civil actions is well-established...the most prevalent example of this type of in rem activity can be found in statutes imposing forfeitures upon vehicles and vessels used to transport contraband drugs....Forfeiture is not limited to property used in drug crimes, however,...federal and state statutes reach virtually any type of property that might be used in the conduct of a criminal enterprise" (631 P.2d. 628). [Emphasis Supplied]

imposing an economic penalty thereby rendering illegal behavior unprofitable'.... This is the manifest purpose of Idaho's one year closing provision; not to prevent future expression, but to punish past illegal conduct by depriving the violator of economic gain. That is a permissible state objective, implemented by permissible means."

At page 629 the Idaho Supreme Court says:

"Our conclusion is based on the following: the extensive powers of the state to impose a forfeiture on neutral and innocent property used in the commission of forbidden acts;

the power of the state to impose sanctions of its choice upon those who disseminate unprotected obscenity; the fact that the forfeiture or closure order is not directed at speech or publication, but is instead aimed at the real property apart from the content of expression contained therein; and the fact that the defendants remain free to disseminate any materials except those already determined to be obscene, at any other location, subject, of course, to further penal actions by the state should the defendants again violate laws regulating obscenity."

This plain and well-spoken rationale

can be lifted wholesale and applied to this case.

III

THE PROCEDURAL SAFEGUARDS OF
FREEDMAN, OF HELLER, OF VANCE, OF MARCUS
AND OF BOOKS DO NOT APPLY

As has been demonstrated, since there is no "prior restraint" of existing or future publications, then Freedman, Heller, Vance, Marcus, and Books do not apply.¹⁵

There is no effort to censor existing or future expression based on its content.¹⁶ As this honorable Court said "Every civil and criminal remedy imposes some conceivable burden on First Amendment

¹⁵ Freedman v. Maryland, 380 U.S. 51 (1965); Heller v. New York, 413 U.S. 483 (1973); Vance v. Universal Amusement, Co., 445 U.S. 308 (1980); Marcus v. Search Warrant, 367 U.S. 717 (1961); A Quantity of Books v. Kansas, 378 U.S. 205 (1968).

¹⁶ Cf., Vance v. Universal Amusement Co., 445 U.S. 308 (1980).

protected activities"¹⁷ and "Bookselling in an establishment used for prostitution does not confer First Amendment coverage to defeat a valid statute aimed at penalizing and terminating illegal use of premises."¹⁸ If we substitute the words "an enterprise" for "premises" in the above quotation we have, in essence, set forth the governmental justification for application of RICO statutes in obscenity cases.

It should be observed that the mere fact that the enterprise has as its purpose a "pornography business" (where individual publications are presumed initially to be protected expression) does

¹⁷ Arcara v. Cloud Books, Inc., 106 S.Ct. 3172, 3177.

¹⁸ Id. at 3178.

not mean that a RICO statute cannot be applied if that business were advanced "by means of a pattern of racketeering activity in which the defendants participated." Cf. United States v. Thevis, 474 Fed. Supp. 134 at 140 (N.D. Ga. 1979), 665 F.2d 616, at 621, cert. denied, 459 U.S. 825 (1982). In particular, "The indictment specified that the corporations were to manufacture 'peep show' machines, to sell sexually explicit literature and to distribute 'adult oriented film.'" United States v. Thevis, 474 F.Supp. 117, at 126 (N.D.Ga. 1979).

Finally, the significance of the Arcara case, as it applies to the rules of Vance, Marcus, Books, and Freedman, can be gleaned from the vigorous dissent in Arcara, when Justices Blackman, Brennan and Marshall complain that:

"Until today, the Court has required States to confine any book banning to materials that are determined through constitutionally approved procedures, to be obscene. See Marcus...Freedman.... Until today, States could enjoin the future dissemination of adult fare as a nuisance only by 'adhering to more narrowly drawn procedures than is necessary for the abatement of ordinary nuisance' See Vance...." (106 S.Ct. 3180).

Amicus quotes the dissent (without agreeing with its sentiments or conclusions) only to further indicate the inapplicability of Vance, Marcus, and Freedman to the case at bar.

IV

THE EIGHTH AMENDMENT IS NOT VIOLATED

It must be remembered that the law does not punish the defendant for obscenity violations per se. RICO added a new dimension to criminal jurisprudence, to wit a concern with "Enterprise Criminality." While the Petitioner makes much of the fact that the punishment, in his opinion, is for distributing seven magazines and videos deemed obscene, such analysis ignores the fact that under RICO the Petitioner is not being punished for the obscenity violations but for "Enterprise Criminality"-- an entirely new concept in criminal law. If he wishes to make an attack under the Eighth Amendment, he should be aiming his weapons at the question of whether the punishments of RICO "Enterprise Criminality" violate the

Constitution. "Enterprise Criminality" should not be read as synonymous with "Organized Crime." The term speaks of the commission of a crime in the context of an organization. Cf. Function of the RICO Concept, Notre Dame Law Review, Vol. 64 page 649 note 12 et seq. (1989). "The entire statutory scheme is based on the 'enterprise' concept, and it is that concept which distinguishes RICO prosecution from any other prosecution." United States v. McManigal, 708 F.2d 276, 285 (7th Cir. 1983), vacated (other grounds), 464 U.S. 979, on remand, 723 F.2d 580 (7th Cir. 1983). "The enterprise is more than an essential element of a RICO charge or claim for relief. The enterprise element is responsible, wholly or in part, for RICO's breadth, for its procedural agility, for its potent

remedies." Function of RICO Concept, supra at page 721.

Amicus' purpose in this portion of the brief is to show first, that obscenity is a serious crime; second, that the Petitioner's punishment is to be based on "enterprise criminality" and not merely on violations of the obscenity law; third, that Congress intended severity in punishment for RICO violations; and fourth, that the cases cited by the Eighth Circuit below are adequate to sustain the sentence.

The suggestion of the Ninth Circuit in United States v. Busher, 817 F.2d 1409 (9th Cir. 1987) that a proportionality review is in order in all RICO cases should be rejected by this honorable Court in favor of the Fourth Circuit approach in Pyrba, 900 F.2d at 753, 756-57, to the

effect that such a review is not in order in that the defendant did not receive a sentence of sufficient severity. The same is true here.

"Enterprise Criminality" is the basis for the sentence, not obscenity. We must remember that "The major purpose of Title IX...was to address the infiltration of legitimate business by organized crime." United States v. Turkette, 452 U.S. 576, 591 (1981). As previously mentioned RICO "was intended to provide new weapons of unprecedented scope." (Russello, supra 464 U.S. 16, 26 (1983)). Under such a rationale for the existence of RICO, the punishment here is not severe enough to trigger a proportionality review. Even, if such a proportionality review were conducted, it is probable the District Court and the Eighth Circuit would have

reached the same result. This is not to say that the proportionality review would not be justified under some circumstances.

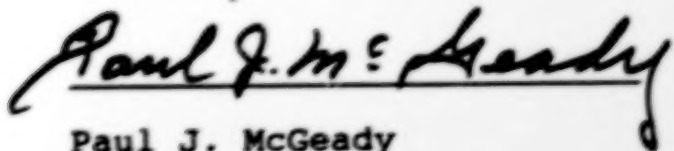
There is a world of difference between the New York Times and the activities of the Petitioner.

CONCLUSION

For all of the above, the decision of the Eighth Circuit should be affirmed.

DATED: September 26, 1992.

Respectfully submitted,

A handwritten signature in cursive script, reading "Paul J. McGeady". The signature is written in dark ink and is positioned above the typed name and address.

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1952

FERRIS A. ALEXANDER, SR.
Petitioner

UNITED STATES OF AMERICA,
Respondent

On Petition Granted To The
United States Court of Appeals for the Fifth Circuit

FERRIS A. ALEXANDER, SR.
Petitioner

UNITED STATES
COURT OF APPEALS
FOR THE FIFTH CIRCUIT
AT NEW ORLEANS, LOUISIANA
JANUARY 13, 1953

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Ely, <i>Constitutional Interpretivism: Its Allure and Impossibility</i> , 52 Ind. L.J. 399, (1978)	3
Emerson, <i>Toward A General Theory of the First Amendment</i> , 72 Yale L.J. 877 (1963)	3
Griffin, <i>Pornography and Silence</i> (1981)	17
Jacobs, <i>Patterns of Violence: A Feminist Perspective on the Regulation of Pornography</i> , 7 Harv. Women's L.J. 5 (1984)	15
Malamuth & Donnerstein eds., <i>Pornography and Sexual Aggression</i> (1984)	17

Malamuth & Donnerstein, <i>The Effects of Aggressive Pornographic Mass Media Stimuli</i> , in 15 <i>Advances in Experimental Social Psychology</i> (1982)	17
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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1992

No. 91-1526

FERRIS J. ALEXANDER, SR.
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent

On Writ Of Certiorari To The
United States Court Of Appeals For The Eighth Circuit

BRIEF AMICUS CURIAE OF
CHRISTIAN LEGAL DEFENSE
IN SUPPORT OF RESPONDENT

INTEREST OF AMICUS IN THIS CASE¹

Amicus is a 20-year old organization representing Christian families, churches, and ministries in defending freedom of conscience and religious liberty for all through direct daily representation in Washington, D.C., newsletters and other materials, seminars on current national issues, and litigation.

¹Counsel of record to the parties in this case have consented to the filing of this brief. Letters of consent have been filed with the Clerk of the Court pursuant to Rule 37.

SUMMARY OF ARGUMENT

This Court's decisions in *Young v. American Mini Theatres, Inc.*,² and *City of Renton v. Playtime Theatres, Inc.*,³ regarding nonobscene sexually explicit speech mirror doctrinal developments relative to permissible defamation, commercial speech, and expressive conduct. Due to the comparatively limited First Amendment value of such speech types, they are not entitled to full First Amendment protection although their close relationship to other speech types requires some intermediate level of protection.

Thus, while the government may not be able to suppress Petitioner's nonobscene sexually explicit speech prior to his RICO conviction, it can impose penalties like forfeiture even though the possibility of those penalties may have a chilling effect. Likewise, the government may act under overbroad statutes that could reach mere sexually explicit speech, and may subject sexually explicit speech to prior restraint, just as it may in connection with commercial speech.

ARGUMENT

I. NONOBSCENE SEXUALLY EXPLICIT SPEECH IS ONLY INTERMEDIATELY PROTECTED UNDER YOUNG V. AMERICAN MINI THEATRES AND OTHER DECISIONS.

This Court has granted a limited, intermediate protection under the First Amendment to certain types of speech previously without any protection from governmental restriction. Those types of speech are commercial speech, permissible defamation, and erotic and other kinds of expressive conduct. Like those types, nonob-

²427 U.S. 50 (1976)(plurality opinion).

³475 U.S. 41 (1986).

Appreciation is expressed to F. Tayton Dencer for his review and criticism of the text of this brief.

scene sexually explicit speech has limited First Amendment value if it has any First Amendment value at all, and has been and should be only intermediately protected.

A. A Category Of Speech That Is Only Intermediately Protected Is Desirable.

1. Intermediate Protection Prevents Total Exclusion.

Some sort of speech categorization is inevitable because full First Amendment protection is not applied to every spoken or printed word or illustration; that Amendment simply does not extend absolutely to every utterance or expression.⁴ Certain types of speech are entirely without protection because they do not have First Amendment value. For example, fighting words,⁵ terroristic or extortionate threats,⁶ immediate seditious advocacy,⁷ and other criminally instrumental words⁸ are without protection because they are merely verbal con-

⁴E.g., *Miller v. California*, 413 U.S. 15, 23 (1973); *Konigsberg v. State Bar*, 366 U.S. 36, 49-51 (1961).

⁵E.g., *Cox v. Louisiana*, 379 U.S. 559, 563 (1965); *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72 (1942).

⁶E.g., *Watts v. United States*, 394 U.S. 705, 707 (1969); *Masson v. Slaton*, 320 F. Supp. 669, 672 (N.D. Ga. 1970).

⁷E.g., *Scales v. United States*, 367 U.S. 203, 228-29 (1961); *Dennis v. United States*, 341 U.S. 494, 501-02 (1951) (plurality opinion).

⁸E.g., *Cox v. Louisiana*, 379 U.S. 559, 563 (1965); *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 502 (1949).

duct tantamount to nonverbal physical attack, subversion, or crime, and have little if any relation to the intellectual communication that is the most clear goal of the First Amendment. Likewise unprotected are obscenity and child pornography,⁹ which, taken as a whole, are mere physical stimulation through nonideational verbal or pictorial incitement.¹⁰

That prevailing approach to the scope of the Speech Clause, categorizing speech as without protection according to its relation to First Amendment values, strongly supports the possibility of categorization of certain speech as only intermediately protected.¹¹ In fact, since not all speech within the arguable scope of the clause has equal First Amendment value, an intermediate level of protection is necessary to avoid cost to speech whose First Amendment

⁹E.g., *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 105 S.Ct. 2794 (1985); *New York v. Ferber*, 458 U.S. 747, 764 (1982); *Miller v. California*, 413 U.S. at 23; *Roth v. United States*, 354 U.S. 476, 481, 485 (1957); See Schauer, *Speech and "Speech"--Obscenity and "Obscenity": an Exercise in the Interpretation of Constitutional Language*, 67 Geo. L.J. 899 (1979) (defending two-level approach to obscenity as unprotected).

¹⁰E.g., D. Barber, *Pornography and Society* 91 (1972); Schauer, *supra* note 9, at 922-23 ("the prototypical pornographic item on closer analysis shares more of the characteristics of sexual activity than of the communicative process" and is "a sexual surrogate").

¹¹Stephan, *The First Amendment and Content Discrimination*, 68 Va. L. Rev. 203, 206, 212-13 (1982); Schauer, *supra* note 9, at 282-296; Scanlon, *Freedom of Expression and Categories of Expression*, 40 U. Pitt. L. Rev. 519, 538-42 (1979).

value is greater.¹² Granting full protection to speech with great potential for harm and only marginal First Amendment value is illogical, and simply will not occur; exclusion is more likely. Thus, granting such speech only intermediate protection may save it from exclusion.¹³

2. Intermediate Protection Requires the Court To Determine First Amendment Values Rather Than Societal Values and Thus Strengthens the First Amendment.

The initial scholarly criticisms of categorization focused on the tendentiousness (or at best arbitrariness) of distinguishing certain kinds of expression from others in terms of their social worth. Social worth, meaning the value of a certain type of speech to the majority, obviously cannot serve as the criterion for delimiting the scope of the Free Speech Clause, for it would render the clause superfluous.¹⁴ However, categorization of certain types of speech as entitled to only intermediate protection does not depend

¹²The scope of the clause may, of course, be defined in such a way that a uniform level of protection makes sense, but only at the cost of excluding important forms of expression from its coverage. See Schauer, *supra* note 9, at 275.

¹³E.g., *id.* at 286. See R. Dworkin, *Taking Rights Seriously*, 261 (1977); Ely, *Constitutional Interpretivism: Its Allure and Impossibility*, 52 Ind. L. J. 399, 420 (1978) (scope and intensity of review, while different issues, are nonetheless related, for "one who thinks he has a mandate to review everything may respond by reviewing nothing very seriously.")

¹⁴See, Emerson, *Toward A General Theory of the First Amendment*, 72 Yale L.J. 877, 887-893 (1963) (discussing dynamics of majoritarian pressures against constitutional values).

upon, and in fact has no necessary connection to, the notion of social worth.¹⁵ Rather, such categorization depends upon the First Amendment value of such speech types, which may be determined from the framers' purpose and intended meaning for the amendment,¹⁶ or in other ways.¹⁷

Regardless of how the Court determines First Amendment values, doing so doubtless will do much to rescue the First Amendment from popular frustration and cynical attitudes engendered by the abuse of destructive profiteers.

B. The Court Has Recognized a Category of Certain Types of Speech Entitled to Only Intermediate Protection.

The Court's past exclusion of certain classes of speech from all protection demonstrates the need for an intermediate level of protection. The Court has treated obscenity, commercial speech, libel, and fighting

¹⁵Cf. *Fort Wayne Books, Inc. v. Indiana*, 103 L. Ed. 2d 34, 62 (Stevens, J., dissenting)("[P]ublic interest in access to sexually explicit materials remains strong despite continuing efforts to stifle distribution.")

¹⁶E.g., W. Berns, *The First Amendment and the Future of American Democracy* (1976); Bork, *Neutral Principles and Some First Amendment Problems*, 47 Ind. L.J. 1 (1971).

¹⁷E.g., BeVier, *The First Amendment and Political Speech: An Inquiry into the Substance and Limits of Principle*, 30 Stan. L. Rev. 299 (1978); Baker, *Scope of the First Amendment Freedom of Speech*, 25 U.C.L.A. L. Rev. 964 (1978); Stephan, *The First Amendment and Content Discrimination*, 68 Va. L. Rev. 203, 210-213 (1982); Note, *Content Regulation and the Dimensions of Free Expression*, 96 Harv. L. Rev. 1854, 1859 (1983).

words, among others, as subcategories of unprotected utterance.¹⁸ Conduct can be added to this list as a generic subcategory, because it functioned in the Court's doctrine as another line for delineating the scope of the Speech Clause.¹⁹ Over the past twenty-five years, the Court has modified its treatment of commercial speech,²⁰ libel,²¹ fighting words,²² and conduct²³ to allow partial,

¹⁸E.g., *Chaplinsky v. New Hampshire*, 315 U.S. at 571-72 ("There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words . . ."); *Valentine v. Chrestensen*, 316 U.S. 52, 54-55 (1942) (commercial advertising unprotected); *Roth v. United States*, 354 U.S. 476, 481, 485 (1957) (obscenity etc.); *Beauharnais v. Illinois*, 343 U.S. 250, 266 (1952) (nonprivileged defamation).

¹⁹E.g., *Cox v. Louisiana*, 379 U.S. 559, 563 (1965); *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 498 (1949); *Teamsters Local 802 v. Wohl*, 315 U.S. 769, 776-77 (1942).

²⁰*Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976).

²¹*New York Times v. Sullivan*, 376 U.S. 254, 271-72 (1964).

²²The fighting words category has never been formally revised, as have each of the others, but the Court's treatment of it has clearly limited it, if not eliminated it. See, e.g., *Eaton v. City of Tulsa*, 415 U.S. 697 (1974); *Hess v. Indiana*, 414 U.S. 105 (1973). The Court has applied the overbreadth doctrine to strike down state statutes purporting to authorize punishment of fighting words. See *Lewis v. New Orleans*, 415 U.S. 130 (1974); *Gooding v. Wilson*, 405 U.S. 518 (1972).

but not full, protection for some, but not all, expression within each. The common characteristics of those types of speech are (1) that they involve limited First Amendment value (substantive characteristic), and (2) that they may be difficult to discern from or segregate from fully protected speech (strategic characteristic).

1. Libel.

The libel decisions paradigmatically illustrate both the strategic and the substantive characteristics calling for intermediate protection. Prior to the Court's decision in *New York Times v. Sullivan*,²⁴ the states were free to regulate and punish libel. In that case, the Court ruled that it was necessary to protect some defamatory falsehood if nondefamatory expression were to have the "breathing space" it needed to survive.²⁵ The Court has interpreted its action as extending "a measure of strategic protection to defamatory falsehood."²⁶ The *New York Times* case limited this strategic protection to libel of public officials, as distinct from all forms of libel,²⁷ and to publication without malice in regard to the falsity of the statements.²⁸ Thus, the Court carved out from unprotected libel an area to

²³United States v. O'Brien, 391 U.S. 367, 377 (1968).

²⁴376 U.S. 254 (1964).

²⁵*Id.* at 271-72, (quoting *N.A.A.C.P. v. Button*, 371 U.S. 415, 433 (1962)).

²⁶*Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 342 (1974).

²⁷376 U.S. at 283.

²⁸*Id.* at 279-80.

which it extended limited protection.²⁹

Although libel's strategic characteristic dominated the Court's opinion in *New York Times*, a substantive characteristic is implicit. Libel contains many of the aspects of protected speech; thus, it appears to fall within the First Amendment. However, it does not deserve full protection because its primary purpose, dissemination of falsehood, quite clearly is not a First Amendment value.

2. Commercial Speech.

The commercial speech addressed by the Court contains substantive and strategic characteristics similar to those of libel. In *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*,³⁰ the Court granted a measure of protection to previously unprotected commercial speech. As in *New York Times*, the Court recognized that some, though not full, protection ought to be accorded to commercial speech,³¹ and that this protection would extend to some, but certainly not all, forms of

²⁹See also *Gooding v. Wilson*, 405 U.S. 518, 521 (1972)(quoting *NAACP v. Button*, 371 U.S. 415, 433 (1963)), in which the author of *New York Times*, Justice Brennan, referred to the necessity to protect fighting words of limited First Amendment value in order to protect other speech: "Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity."

³⁰425 U.S. 748 (1976).

³¹*Id.* at 771-72 & n.24. Because the protection accorded is not full, the First Amendment "allow[s] modes of regulation that might be impermissible in the realm of noncommercial expression." *Ohrlik v. Ohio State Bar Ass'n*, 436 U.S. 447, 456 (1978).

commercial utterance.³² Leaving aside for the most part the strategic rationale, the Court in *Virginia Pharmacy* sought to ground its decision in the view that commercial speech is substantively different from other forms of speech.³³ The Court elaborated this view in *Ohralik v. Ohio State Bar Association* and numerous other decisions:

In rejecting the notion that such speech "is wholly outside the protection of the First Amendment," *Virginia Pharmacy, supra*, at 761, we were careful not to hold "that it is wholly undifferentiable from other forms" of speech. 425 U.S., at 771 n.24. We have not discarded the "common-sense" distinction between speech proposing a commercial transaction . . . and other varieties of speech. *Ibid.* To require a parity of constitutional protection for commercial and noncommercial speech alike could invite dilution, simply by a leveling process, of the force of the Amendment's guarantee with respect to the latter kind of speech. Rather than subject the First Amendment to such a devitalization, we instead have afforded commercial speech a *limited measure of protection*, commensurate with its *subordinate position* in the scale of First Amendment values³⁴

³²425 U.S. at 764 (recognizing differing public interest in different commercial messages).

³³425 U.S. at 761, 771-72 n.24.

³⁴436 U.S. at 455-56 (1978)(emphasis added). *Accord*, *Central Hudson Gas & Elec. Corp. v. Pub. Service Comm'n*, 447 U.S. 557, 562-63 (1980); *Friedman v. Rogers*, 440 U.S. 1, 10-11 n.9 (1979); *SEC v. Lowe*, 725 F.2d 892, 901 n.6 (2d Cir. 1984)("middle level" protection . . . for . . . commercial advertising"), *rev'd*, 472 U.S. 181 (1985); *see generally* Note, *First Amendment Protection for Commercial Advertising: The New Constitutional Doctrine*, 44 U.

Although the speech component suggests some First Amendment protection is due, the Court denied that full protection can be afforded to commercial speech, for the state cannot "lose its power to regulate commercial activity deemed harmful to the public whenever speech is a component of that activity."³⁵

At a strategic level, commercial speech that involves limited First Amendment value may be difficult to discern from fully protected speech, although not as difficult to discern as libel. Also, aspects of commercial speech with limited First Amendment value may be difficult to segregate from those aspects with clear First Amendment value.³⁶ Just as the problem of libel presented a combination of falsehood and nonfalse speech, so commercial speech is a mixture of argument and solicitation.

3. Conduct.

Some early decisions implied an absolute dichotomy between speech and conduct, with speech being fully

Chi. L. Rev. 205, 222-54 (1976); Roberts, *Toward a General Theory of Commercial Speech and the First Amendment*, 40 Ohio St. L.J. 115, 131 (1979).

³⁵*Friedman v. Rogers*, 440 U.S. at 10-11 n.9 (quoting *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 456 (1978)).

³⁶*See Posadas de Puerto Rico Associates v. Tourism Company*, 92 L.Ed.2d 266 (1986). The Court upheld restriction of commercial advertising of gambling while acknowledging that the government's purpose was to prevent encouragement of gambling. Such general encouragement, as opposed to solicitation to frequent a particular establishment, seems clearly to be a value of the First Amendment.

protected and conduct wholly unprotected.³⁷ Later decisions recognized that the speech component of expressive conduct deserved protection.³⁸ Nevertheless, much that is expressive in conduct does not implicate in any substantial way First Amendment values, so such conduct was entitled to only limited protection. For example, in *Barnes v. Glen Theatre, Inc.*,³⁹ the Court recognized that "almost limitless types of conduct - including appearing in the nude in public - are 'expressive,' . . . in one sense of the word," but that the more graphic expression added by totally nude dancing could be limited. Indeed, to accord full protection for all conduct that has an expressive dimension would too greatly undermine the state's power to regulate conduct, just as with commercial advertising. Thus, the rule fashioned by the Court provides a form of limited protection; the state can regulate expressive conduct if it has a substantial interest unrelated to the suppression of political expression.⁴⁰

The prevailing rule regarding nonobscene sexually explicit conduct such as nonobscene topless or bottomless dancing is that only limited First Amendment protection applies to it, although "nude dancing is not

³⁷E.g., *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490 (1949).

³⁸See, e.g., *Brown v. Louisiana*, 383 U.S. 131 (1966).

³⁹111 S.Ct. 2456, 2463 (1991) (plurality opinion).

⁴⁰E.g., *United States v. O'Brien*, 391 U.S. 367, 377 (1968). See *Arcara v. Cloud Books, Inc.*, 478 U.S. 697, 702 (1986) (O'Brien involved "scrutiny of a statute regulating conduct which has the incidental effect of burdening the expression of a particular political opinion.") (emphasis supplied).

without its First Amendment protections.⁴¹ This is evident in the Supreme Court decisions in *California v. LaRue*⁴² and *New York State Liquor Authority v. Bellanca*,⁴³ which upheld prohibitions of nude dancing and topless dancing, respectively, in establishments with liquor licenses.⁴⁴

On a substantive level, then, regulation of expression that implicates First Amendment values in only a marginal way logically does not violate the First Amendment. On a strategic level, however, sensitivity to clear First Amendment values requires that such expression be afforded some protection. The development of a theory of intermediate protection is, thus, a response calibrated to accommodate legitimate state interests while protecting First Amendment values.

C. Nonobscene Sexually Explicit Speech Falls Within the Category of Intermediately Protected Speech.

⁴¹*Schad v. Borough of Mt. Ephraim*, 452 U.S. 61, 66. (1981) See also *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 932 (1975) ("might be entitled to . . . protection under some circumstances").

⁴²409 U.S. 109 (1972).

⁴³452 U.S. 714 (1981) (per curiam).

⁴⁴409 U.S. at 118; 452 U.S. at 715-18. Although the Court stressed the states' regulatory authority under the Twenty-first Amendment, it did not state or intimate that such regulation would constitute a compelling state interest, and therefore allowed regulation of nude and topless dancing that would not be permissible for fully protected expression. See also *Young v. American Mini Theatres, Inc.*, 427 U.S. 50 (1976) (upholding regulation, *inter alia*, of "Group D cabarets" with partially nude performance, on the basis of legitimate state interest).

If one visualizes a continuum of expression ranging from total obscenity to fully protected forms of expression, nonobscene erotic material would fall somewhere between those conceptual endpoints.⁴⁵ As the erotic component of expression becomes increasingly dominant and conspicuous, the expression would begin to look more and more like obscenity, until at some point it passes into that unprotected status.⁴⁶ It would be both unrealistic and theoretically inconsistent with this graduated view of expression to impose a total transmogrification at some specific point on the continuum from nonobscenity to obscenity. More realistic and consistent is categorizing nonobscene erotic speech as entitled to the same intermediate protection to which commercial speech, permissible defamation, and expressive conduct are entitled.

1. Limited First Amendment Value.

Although the "portrayal of sex, e.g., in art, literature and scientific works, is not itself sufficient reason to deny material the constitutional protection of freedom of speech and press,"⁴⁷ that

⁴⁵Cf. Note, *Anti-Pornography Laws and First Amendment Values*, 98 Harv. L. Rev. 460, 469-474 (1984) (discussing hybrid character of pornography).

⁴⁶Cf. *California v. LaRue*, 409 U.S. 109, 117 (1972) ("as the mode of expression moves from the printed page to the commission of public acts that may themselves violate valid penal statutes, the scope of permissible state regulations significantly increase").

⁴⁷*Roth v. United States*, 354 U.S. 476, 487 (1957) (footnote omitted). E.g., *Schad v. Village of Mount Ephraim*, 452 U.S. at 66 (1981) (nudity).

Although in *Roth* the Court stated that "[a]ll ideas having even the slightest redeeming social importance--unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion"--have full First Amendment protection, 354

principle does not mean that sexual acts or similar conduct are protected by the First Amendment at all,⁴⁸ and it does not demand the same degree of protection for erotic material as for traditionally protected speech and press.⁴⁹

Nonobscene sexually explicit material involves little, First Amendment value. The purpose and effect of such material is not intellectual stimulation but merely physical stimulation, as demonstrated in part by the limited verbal aspect of much of that material. Moreover, purchasers, authors and vendors of such erotic materials are carrying on commercial noncommunicative

U.S. at 484, this dictum means only that ideas are fully protected, whether political, literary, artistic, and scientific, not that the predominant conduct of sexually-explicit material is fully protected. In fact, when *Roth* was decided, much of the erotic material involved in the instant case probably would have been considered obscene and thus unprotected.

⁴⁸E.g., *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 66 & n.13 (1973); *Lovisi v. Slayton*, 539 F.2d 349, 351-52 (4th Cir.), cert. denied, 429 U.S. 977 (1976).

⁴⁹Ascribing only partial First Amendment protection to erotic material does not reduce the constitutional protection for such expression; instead, it results from the relatively recent shift of erotic material from the unprotected category to some protection. E.g., *Schauer*, *supra* note 9, at 907-08 & n.50 (courts have given First Amendment protection but reduced its level in such areas as nonobscene erotic material and nonobscene indecent language); compare *Schauer*, *The Law of Obscenity* 21-22 (1976) (in obscenity prosecutions in the nineteenth century, "almost anything that concerned sexual relationships in any way was presumed to be obscene") and *Commonwealth v. Holmes*, 17 Mass. 336 (1821) (example of same) with *Miller v. California*, 413 U.S. at 24 (narrow test for obscenity).

action rather than sincerely conveying any First Amendment expression.⁵⁰ Erotic material is closer to unprotected obscenity, prostitution, sexual solicitation, and nonartistic public nudity than to protected expression of any type. In this sense, nonobscene sexually explicit material shares many of the very characteristics of unprotected sexually explicit expression, like obscenity and child pornography, that render it unprotected. In fact, the Court in both *Ferber*⁵¹ and *Osborne v. Ohio*,⁵² in addition to noting the danger posed to children by child pornography, noted that "the value of permitting child pornography" is "exceedingly modest, if not de minimis."

2. Relation to Other Speech.

While nonobscene sexually explicit expression may contain some characteristics of speech, and thus have some limited First Amendment value, and while such expression may be entwined with speech implicating more clearly First Amendment values, restriction short of actual suppression strikes a reasonable balance between the state's interest and such fully protected speech. As with advertising, anything more than limited protection for erotic material "could invite dilution, simply by a leveling process, of the force of the [First]

⁵⁰ See, e.g., *Young v. American Mini Theatres, Inc.*, 427 U.S. at 70; *California v. LaRue*, 409 U.S. at 118 ("in the form of movies or live entertainment, 'performances' that partake more of gross sexuality than of communication"); Schauer, *Response: Pornography and the First Amendment*, 40 U. Pitt. L. Rev. 605, 608 (1979) ("none of the philosophical justifications of a distinct concept of freedom of speech would put direct sexual excitement within the confines of that principle").

⁵¹ 458 U.S. at 762.

⁵² 495 U.S. 103, 108 (1990).

Amendment's guarantee with respect to the latter kind of speech."⁵³

3. State Interest.

Moreover, the limited First Amendment value of such speech is dwarfed by the potential harm of such speech. Joining theological conservatives and political conservatives who cite the negative impact on morality and family stability, feminists generally are attacking most such erotic material because of its degradation of women and its frequent endorsement of violent sex.⁵⁴ The evidence of a correlation between sexually explicit material (whether or not legally obscene) and sexual crimes continues to mount.⁵⁵

4. Precedent.

This Court acknowledged the "lesser" First Amendment protection for nonobscene erotic material in the plurality opinion in *Young v. American Mini Theatres*,

⁵³ *Central Hudson Gas & Elec. Corp. v. Pub. Service Comm'n*, 447 U.S. at 563 n.5 (quoting *Ohrlik v. Ohio State Bar Ass'n*, 436 U.S. at 456).

⁵⁴ E.g., A. Dworkin, *Pornography: Men Possessing Women* (1981); S. Griffin, *Pornography and Silence* (1981); K. Barry, *Female Sexual Slavery* 174-214 (1979); Jacobs, *Patterns of Violence: A Feminist Perspective on the Regulation of Pornography*, 7 Harv. Women's L.J. 5 (1984).

⁵⁵ E.g., *Pornography and Sexual Aggression* (N. Malamuth & E. Donnerstein eds. 1984); Donnerstein, *Pornography and Violence against Women: Experimental Studies*, in *Pornography and Censorship* 219 (D. Copp & S. Wendell eds. 1983); Malamuth & Donnerstein, *The Effects of Aggressive Pornographic Mass Media Stimuli*, in 15 *Advances in Experimental Social Psychology* 103 (1982); Strickling, Copp & Wendell, *Selected Bibliography of Social Science Essays*, in *Pornography and Censorship*, *supra* at 311.

Inc.:

[T]here is surely a *less* vital interest in the uninhibited exhibition of material that is on the borderline between pornography and artistic expression than in the free dissemination of ideas of social and political significance . . .
⁵⁶

[E]ven though we recognize that the First Amendment will not tolerate the total suppression of erotic materials that have some arguably artistic value, it is manifest that society's *interest in protecting this type of expression is of a wholly different, and lesser, magnitude* than the interest in untrammelled political debate that inspired Voltaire's immortal comment. Whether political oratory or philosophical discussion moves us to applaud or to despise what is said, every schoolchild can understand why our duty to defend the right to speak remains the same. But few of us would march our sons and daughters off to war to preserve the citizen's right to see "Specified Sexual Activities" exhibited in the theaters of our choice.
⁵⁷

The Court's finding of a "lesser" First Amendment protection for erotic material was clearly the premise for its findings that reasonable regulation of such material does not abridge freedoms of speech and press and that content-based regulation of sexually explicit material does not violate equal protection.
⁵⁸

⁵⁶427 U.S. at 61 (plurality opinion) (emphasis added).

⁵⁷*Id.* at 70 (plurality opinion) (emphasis added).

⁵⁸*E.g., id.* at 96 (dissenting justices' "forthright rejection of the notion that First Amendment protection is diminished for 'erotic materials'"); *Stansberry v. Holmes*, 613 F.2d 1285, 1288

The Court referred to that premise, neither reaffirming nor repudiating it, and made similar findings in terms of sustaining reasonable regulation despite its content discrimination toward nonobscene erotic material, in *City of Renton v. Playtime Theatres, Inc.*⁵⁹ Likewise, in *Bethel School District No. 403 v. Fraser*,⁶⁰ the Court determined that "the penalties imposed [for an indecent speech] were unrelated to any political viewpoint," and thus could be imposed. The Second Circuit, along with other courts, has noted that "[r]elevant Supreme Court decisions suggest that a similar 'middle level' protection is appropriate for certain kinds of speech, for example in areas of regulation of commercial advertising [and] zoning of theaters which play 'adult' but not obscene films."⁶¹

Other decisions, besides *Mini Theatres* and the advertising and libel and expressive conduct analogies, support the proposition that erotic material is only intermediately protected expression.⁶² These

(5th Cir.) ("Young affords certain 'speech' activities lesser protection"), *cert. denied*, 449 U.S. 886 (1980); Note, *Constitutional Law--First Amendment--Content Neutrality*, *Young v. American Mini Theatres, Inc.*, 28 Case W. Res. L. Rev. 456, 478 (1978); Comment, *The Supreme Court, 1976 Term--Constitutional Law*, 90 Harv. L. Rev. 58, 200 (1976)(same).

⁵⁹475 U.S. at 47 ("To be sure, the ordinance treats theaters that specialize in adult films differently from other kinds of theatres.")

⁶⁰478 U.S. 675, 685 (1986).

⁶¹*S.E.C. v. Lowe*, 725 F.2d 892, 901 n.6 (2d Cir. 1984), *rev'd* on other grounds, 472 U.S. 181 (1985).

⁶²While the Supreme Court considered cases involving sex-related films in *Interstate Circuit, Inc. v. Dallas*, 390 U.S. 676 (1968), and *Erznoznik v. City of Jacksonville*, 422 U.S. 205 (1975), neither case

decisions involve nonobscene but indecent speech, nonobscene but erotic expressive conduct, and obscenity itself with a variable scope, all of which tacitly (and sometimes explicitly) recognize a role for intermediate protection in First Amendment doctrine.

The Supreme Court in *FCC v. Pacifica Foundation*,⁶³ in sustaining under the First Amendment a statutory prohibition against broadcast of nonobscene "indecent" speech,⁶⁴ permitted regulation of sexually explicit expression⁶⁵ that would not have been constitutionally permissible for fully protected speech or press. That ruling implicitly indicates a lesser First Amendment protection for such nonobscene material. In fact, the plurality opinion stated that such "patently offensive references to excretory and sexual organs and activities" "lie at the periphery of First Amendment concern," and that "[t]heir place in the hierarchy of First Amendment values was . . . 'no essential part of any exposition of ideas'" ⁶⁶

involved an ordinance regulating sexually-explicit films or publications and both regulated fully-protected films as well as arguably erotic ones. The ordinance in *Interstate Circuit* concerned classification of films encouraging "sexual promiscuity," 390 U.S. at 687, and that in *Erznoznik* concerned any nudity at all visible from public roads, 422 U.S. at 213, rather than sexually-explicit films. In *Mini Theatres*, both the plurality opinion and the concurring opinion (written by the author of the *Erznoznik* opinion) distinguished *Erznoznik* on this basis. 427 U.S. at 72 n.35, 83.

⁶³438 U.S. 726 (1978).

⁶⁴*Id.* at 744 (plurality opinion); *id.* at 756, 761 (Powell, J., concurring).

⁶⁵*Id.* at 743.

⁶⁶*Id.* at 743, 746 (quoting *Chaplinsky v.*

The Court in *LaRue*,⁶⁷ in upholding a regulation of sexually explicit dancing, films, and pictures in bars with liquor licenses, also recognized the lesser First Amendment protection of such erotic entertainment and materials as compared with political, artistic, literary, and scientific speech and press. The majority stated that, while "at least some of the performances [and films and pictures] to which these regulations address themselves are within the limits of the constitutional protection of freedom of expression," they are not "the constitutional equivalent of a performance by a scantily clad ballet troupe in a theater."⁶⁸ Consequently, "as the mode of expression moves from the printed page to the commission of public acts that may themselves violate valid penal statutes, the scope of permissible state regulations significantly increases."⁶⁹

The obscenity decisions of the Supreme Court, in *Miller v. California*⁷⁰ and other cases, have implicitly found less constitutional protection for sexually explicit material on the periphery of obscenity. Those decisions have permitted variation in the three factors constituting obscenity, with the effect of shifting erotic material into the obscenity category in some cases and out of that unprotected category in others; such variation would not be permissible for fully protected speech and press. That variation in-

New Hampshire, 315 U.S. 571-72).

⁶⁷409 U.S. at 118. See *New York State Liquor Auth. v. Bellanca*, 452 U.S. at 715-18 (1981) (per curiam) (upholding prohibition of topless dancers in establishments with liquor licenses as "a reasonable restriction").

⁶⁸409 U.S. at 118.

⁶⁹*Id.* at 117. Accord, *Doran v. Salem Inn, Inc.*, 422 U.S. at 932.

⁷⁰413 U.S. 15, 25-26 (1973).

cludes patent offensiveness as determined by different community standards,⁷¹ prurient appeal as influenced by the deviant nature of the recipient group,⁷² and all three *Miller* factors as adjusted for the minority age of the recipient individuals.⁷³

II. AS INTERMEDIATELY PROTECTED SPEECH, NONOBSCENE SEXUALLY EXPLICIT SPEECH IS SUBJECT TO MORE LIMITATIONS THAN FULLY PROTECTED SPEECH, INCLUDING THE LIMITATIONS INHERENT IN RICO FORFEITURE.

For intermediately protected expression, the First Amendment often has been and should be viewed as permitting greater regulation generally. For commercial advertising, the Supreme Court's decisions "allow[] modes of regulations that might be impermissible in the realm of non-commercial expression."⁷⁴ The state

⁷¹*Id.* at 30.

⁷²*E.g.*, *Mishkin v. New York*, 383 U.S. 502, 509-09 (1966).

⁷³*E.g.*, *Ginsberg v. New York*, 390 U.S. 629, 638 (1968); *see New York v. Ferber*, 458 U.S. 747 (1982) (child pornography).

⁷⁴*Friedman v. Rogers*, 440 U.S. at 10-11 n.9, (quoting *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. at 456). *Accord*, *e.g.*, *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 105 S.Ct. 2265, 2276 (1985); *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 65 (1983); *In re R.M.J.*, 455 U.S. 191, 203 (1982); *Central Hudson Gas & Elec. Corp. v. Public Svc. Comm'n*, 447 U.S. 557, 563 (1980); *Kleiner v. First National Bank*, 751 F.2d 1193, 1204 (11th Cir. 1985) ("Commercial speech is subjected to stricter governmental regulations, consistent with the 'subordinate position in the scale of First Amendment'

can prohibit misleading and deceptive as well as false advertisements,⁷⁵ suppress advertising concerning illegal transactions,⁷⁶ require necessary warnings or disclaimers on commercial advertisements,⁷⁷ and prohibit attorneys' solicitation for nonideological litigation or broadcast advertising for cigarettes.⁷⁸ Likewise, the First Amendment has been and should be viewed as permitting other limitations of intermediately protected expression to which fully protected expression are not subject. For example, "the States may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual."⁷⁹

values assigned commercial speech.").

⁷⁵*E.g.*, *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 105 S.Ct. at 2275; *Bolger v. Youngs Drug Products Corp.*, 463 U.S. at 69; *In re R.M.J.*, 455 U.S. at 203; *Friedman v. Rogers*, 440 U.S. at 9; *Bates v. State Bar*, 433 U.S. 350, 383 (1977); *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. at 771-72 & n.24.

⁷⁶*E.g.*, *Bolger v. Youngs Drug Products Corp.*, 463 U.S. at 47; *Village of Hoffman Estates v. Flipside*, 455 U.S. 489, 496 (1982); *Bates v. State Bar*, 433 U.S. at 384; *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. at 388.

⁷⁷*E.g.*, *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. at 772 n.24; *Warner-Lambert Co. v. FTC*, 562 F.2d 749, 758-59 (D.C. Cir. 1977), *cert. denied*, 435 U.S. 950 (1978).

⁷⁸*E.g.*, *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447 (1978); *Capital Broadcasting Co. v. Kleindienst*, 405 U.S. 1000 (1972).

⁷⁹*Gertz v. Robert Welch, Inc.*, 418 U.S. at

Nonobscene sexually explicit expression is also subject to greater regulation and limitation, short of total prohibition, than is fully protected expression, as the Supreme Court's decisions in *Mini Theatres*, *Bellanca*, *LaRue*, and *Pacifica Foundation* evince.⁸⁰ Although the plurality in *Mini Theatres* observed in a footnote that the Detroit "situation would be quite different if the ordinance had the effect of suppressing, or greatly restricting

347-48. *Accord*, *Dunn & Bradstreet, Inc. v. Greenmoss*, 472 U.S. 749, (1985); *Time, Inc. v. Firestone*, 424 U.S. 448, 460 (1976); *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 499 (1975); *Cantrell v. Forest City Pub. Co.*, 419 U.S. 245, 250 (1974); *Bichler v. Union Bank & Trust Co.*, 715 F.2d 1059, 1063, *reh'g granted, vacated*, 718 F.2d 802; (6th Cir.); *Schultz v. Newsweek*, 668 F.2d 911, 918 (6th Cir. 1982); *Clark v. American Broadcasting Companies*, 684 F.2d 1208, 1214 n.4 (6th Cir. 1982), *cert. denied*, 460 U.S. 1040 (1983); *Brewer v. Memphis Pub. Co.*, 626 F.2d 1238, 1246 (5th Cir. 1980), *cert. denied*, 452 U.S. 962 (1981).

⁸⁰*Schad* is not contrary to this rule, because the ordinance there excluded all live entertainment from commercial zones, and thereby "prohibit[ed] a wide range of expression that has long been held to be within the protections of the First and Fourteenth Amendments," 452 U.S. at 65, as well as prohibiting partially protected nude dancing from adult establishments. *Doran* is also not contrary, because it found unconstitutional a total prohibition of topless dancing in establishments without liquor licenses that would have been constitutional if limited to establishments with liquor licenses. *New York State Liquor Auth. v. Bellanca*, 452 U.S. at 716-17. *Vance v. Universal Amusement Co.*, 445 U.S. 308 (1980)(*per curiam*), is not contrary, because it involved total prohibition of erotic material under a public nuisance statute without a judicial finding of obscenity. And *Erznoznik* is not contrary. Note 62, *supra*.

access to, lawful speech,"⁸¹ it meant that such a great restriction would be "more than a limitation on the place,"⁸² and it did not identify erotic material as sufficiently protected "lawful speech" to change the situation. Such expression is subject to the limitations presented by this case.

A. Nonobscene Sexually Explicit Speech Is Properly Subject to Any Self-censorship Inherent in RICO Forfeiture.

While petitioner in this case confines his arguments to the effect of forfeiture upon post-forfeiture speech, his repeated references to the potentially tremendous impact of such forfeiture imply that book-sellers, theater owners and other vendors of sexually explicit materials will feel an unconstitutional chilling effect and will censor such materials themselves. Forfeiture certainly does not appear as horrific as petitioner attempts to paint it if the person subject to forfeiture may avoid it simply by refraining from selling obscenity, but to avoid selling obscenity, such vendors may cautiously censor nonobscene sexually explicit materials.

Of course, the Court has previously refused to identify the inducement to such self-censorship as a constitutional violation:

[D]eterrence of the sale of obscene materials is a

⁸¹427 U.S. at 71 n.35 (plurality opinion).

⁸²*Id.* at 71. The text of the opinion, to which footnote 35 relates, states: "Since what is ultimately at stake is nothing more than a limitation on the place where adult films may be exhibited,³⁵ even though the determination of whether a particular film fits that characterization turns on the nature of its content, we conclude that the city's interest in the present and future character of its neighborhoods adequately supports its classification of motion pictures." *Id.* at 71-72.

legitimate end of state anti-obscenity laws, and our cases have long recognized the practical reality that "any form of criminal obscenity statute applicable to a bookseller will induce some tendency to self-censorship and have some inhibitory effect on the dissemination of material not obscene." *Smith v. California*, 361 US 147, 154-155, 4 L Ed 2d 205, 80 S Ct 215, 14 Ohio Ops 2d 459 (1959). Cf. also *Arcara v. Cloud Books, Inc.*, 478 US 697, 706, 92 L Ed 2d 568, 106 S Ct 3172 (1986).⁸³

In addition, any increased inducement to self-censorship caused by the addition of forfeiture to other criminal punishments does not violate the First Amendment because nonobscene sexually explicit speech is only intermediately protected. To deny to the people such a valuable tool against harmful obscenity and racketeering solely because it impinges speech that implicates First Amendment values in only a marginal way is unreasonable. The majority in *Mini Theatres*, in denying standing for a vagueness challenge, gave the following rationale:

Since there is surely a less vital interest in the uninhibited exhibition of material that is on the borderline between pornography and artistic expression than in the free dissemination of ideas of social and political significance, and since the limited amount of uncertainty in the ordinance is easily susceptible of a narrowing construction, we think this is an inappropriate case in which to adjudicate the hypothetical claims of persons not before the Court.

. . . . The fact that the First Amendment protects some, though not necessarily all, of that material from total suppression does not warrant the further conclusion that an exhibitor's doubts . . . involves the kind of threat to the free market in ideas and expression that

⁸³Fort Wayne Books, Inc. v. Indiana, 103 L.Ed.2d 34, 49 (1989).

justifies the exceptional approach [of overbreadth standing] to constitutional adjudication recognized in cases like *Dombrowski* . . .
⁸⁴

The decisions in *Pacifica Foundation* and *LaRue* support this point as well.⁸⁵

B. Nonobscene Sexually Explicit Speech Is Properly Subject to Any Overbroad Regulation of Obscenity Inherent in Rico Forfeiture.

Petitioner's argument that forfeiture may constitute overbroad regulation is of course merely another way of

⁸⁴427 U.S. at 61.

⁸⁵FCC v. Pacifica Foundation, 438 U.S. at 743 (plurality opinion) (because such "references to excretory and sexual organs and activities" "lie at the periphery of First Amendment concern," the Court "decline[d] to administer that medicine" of "[i]nvalidating any rule on the basis of its hypothetical application to situations not before the Court"); *California v. LaRue*, 409 U.S. at 118-19 & n.5 (1972) (the Court there "refused to apply the overbreadth doctrine" to regulation of sexually explicit dancing, films, and pictures in establishments with state liquor licenses).

Although *Erznoznik* found an ordinance overbroad that prohibited exhibition of films containing any nudity and visible from public streets, it involved fully protected expression that was impermissibly regulated through the ordinance's overbreadth as well as (partially protected) sexually explicit films that were as here permissibly regulated; Note, *Using Constitutional Zoning to Neutralize Adult Entertainment--Detroit to New York*, 5 Fordham Urb. L.J. 455, 463 (1977). It was distinguished on this basis by a majority in *Mini Theatres*. 427 U.S. at 72 n. 35 (plurality opinion); *id.* at 83 (Powell, J., concurring).

saying that the government may not punish by confiscating assets rather than imposing prison terms. The word "overbreadth" may apply to forfeiture in the sense that nonobscene assets are subject to forfeiture for predicate acts involving obscenity, but the doctrine, that statutes or regulations may be facially invalid because they authorize prosecution of protected activity, does not. Only the illegal obscenity-related conduct is being prosecuted.

Even if the doctrine of overbreadth were applicable to forfeiture, however, the doctrine would not prevent the forfeiture of nonobscene sexually explicit material. Since such material, like commercial speech, has limited First Amendment value and is only intermediately protected, the *threat* posed by an overbroad statute or regulation, like the threat posed by vagueness, is marginal and therefore tolerable. Intermediately protected erotic material, like commercial advertising, "may be more durable than other kinds" of speech and press because through its integral relation to "commercial profits . . . there is little likelihood of its being chilled by proper regulation and foregone entirely."⁸⁶ The Court has held that "the overbreadth doctrine does not apply to commercial speech."⁸⁷ That doctrine⁸⁸

⁸⁶Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. at 772 n.24. See also Central Hudson Gas & Elec. Corp. v. Pub. Service Comm'n, 447 U.S. at 571 n.13.

⁸⁷Village of Hoffman Estates v. Flipside, 455 U.S. at 497. Accord, e.g., Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. at 565 n.8; Village of Schaumburg v. Citizens for a Better Environment, 444 U.S. 620, 635 (1980); Bates v. State Bar, 433 U.S. at 380-81.

⁸⁸Bigelow v. Virginia, 421 U.S. 809, 816-17 (1975); Laird v. Tatum, 408 U.S. 1, 13-14 (1972). Although it may appear to apply overbreadth analysis to intermediately-protected expression, *Bigelow*

should not be applied to *any* intermediately protected expression, including nonobscene sexually explicit speech.

C. Nonobscene Sexually Explicit Speech Is Properly Subject to Any Prior Restraint Inherent in RICO Forfeiture.

Even if the Court accepts Petitioner's argument that forfeiture of expressive materials is a prior restraint rather than simply punishment for criminal violations, nonobscene sexually explicit materials are legitimately subject to forfeiture because they are properly subject to prior restraints. Just as for commercial advertising "the different degree of protection" "may also make inapplicable the prohibition against prior restraints,"⁸⁹ the different degree of protection

involved a fully protected constitutional right with apparent First Amendment ties that invoked overbreadth analysis, see *Roe v. Wade*, 410 U.S. 113 (1973), and the Supreme Court expressly declined to rely on overbreadth grounds, 421 U.S. at 817-18.

⁸⁹*Friedman v. Rogers*, 440 U.S. at 10 (quoting *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. at 772 n.24). Accord, e.g., *Central Hudson Gas & Elec. Corp. v. Pub. Service Comm'n*, 447 U.S. at 571 n.13; see *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 464 (1978) (upholding bar rules against partially protected attorneys' solicitation "whose objective is the prevention of harm before it occurs"); Comment, *FTC v. Simeon Management Corp.: The First Amendment and the Need for Preliminary Injunctions of Commercial Speech*, 1977 Duke L.J. 489, 501-10 (injunctions against commercial speech do not violate prior restraint rule). The prior restraint rule does not apply to unprotected expression such as obscenity. *Kingsley Books, Inc. v. Brown*, 354 U.S. 436 (1957); *Near v. Minnesota*, 283 U.S. 697, 716 (1931).

Moreover, the prior restraint rule, *New York Times Co. v. United States*, 403 U.S. 713, 714 (1971) (per

afforded sexually explicit materials subjects them to prior restraints. Just as cigarette advertisements may be banned from television,⁹⁰ nonobscene "indecent" language may be prohibited,⁹¹ and, logically, nonobscene sexually explicit material may be subject to forfeiture.

In fact, in response to a prior restraint challenge in *Arcara v. Cloud Books, Inc.*,⁹² the Court stated:

[U]nlike the symbolic draft card burning in *O'Brien*, the sexual activity carried on in this case manifests absolutely no element of protected expression. In *Paris* . . . , we underscored the fallacy of seeking to use the First Amendment as a cloak for obviously unlawful public sexual conduct by the diaphanous device of attributing protected expressive attributes to that conduct. First Amendment values may not be invoked by merely linking the words "sex" and "books."

CONCLUSION

For the foregoing reasons, CLD respectfully urges this Court to affirm the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

curiam); *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963), does not absolutely prohibit prior restraints. *Times Film Corp. v. City of Chicago*, 365 U.S. 858 (1961); *Near v. Minnesota*, 283 U.S. at 716.

⁹⁰*Capital Broadcasting Co. v. Kleindienst*, 405 U.S. 1000 (1972), *aff'g mem.* 333 F.Supp. 582 (D.D.C. 1971).

⁹¹*F.C.C. v. Pacifica Foundation*, 438 U.S. at 744 (plurality opinion).

⁹²478 U.S. 697, 705 (1986).

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FERRIS J. ALEXANDER, SR., *Petitioner*,
v.
UNITED STATES OF AMERICA, *Respondent*.

On Writ Of Certiorari To The
United States Court Of Appeals
For The Eighth Circuit

**BRIEF AMICI CURIAE OF RELIGIOUS ALLIANCE
AGAINST PORNOGRAPHY, NATIONAL COALITION
AGAINST PORNOGRAPHY, NATIONAL LAW
CENTER FOR CHILDREN AND FAMILIES
IN SUPPORT OF THE RESPONDENT.**

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INTEREST OF THE AMICI CURIAE*

The Religious Alliance Against Pornography ("RAAP") is an unprecedented inter-faith alliance, including the senior leaders and executives of nearly 50 faith groups, deno-minations and inter-faith organizations. RAAP members currently serve a constituency of over 100 million U.S. citizens. RAAP is united around two central principles: (1) a deep commitment to the religious and speech freedoms guaranteed by our First Amendment, and (2) the conviction that child pornography and obscenity are evils which should and must be eliminated from American society. RAAP is strongly supportive of federal, state, and local efforts to strengthen obscenity and child protection laws.

The National Coalition Against Pornography is a national non-profit organization which seeks to eliminate child pornography and illegal obscenity city by city across the entire United States through building broad coalitions, raising public awareness and facilitating legal and legislative action.

The National Law Center for Children and Families, a national non-profit law center and clearinghouse which focuses upon legal and research issues surrounding child sexual exploitation and illegal pornography, concentrates on the enforcement of existing laws, the promulgation of the new ordinances and legislation, the defense of such legislation and public/professional education in the areas of sexual exploitation and illegal pornography.

SUMMARY OF ARGUMENT

Prior to the late 1980's, when obscenity and child pornography became predicate acts to RICO, hard-core pornography was a growing and unstoppable profit-center for

* A complete description of Amici may be found in the appendix. This brief is submitted with the written consent of both parties, filed with the clerk of this Court.

organized crime. According to law enforcement estimates, "organized crime controlled 85-90% percent of the \$8-10 billion per year hard-core pornography industry." The industry abused children, exploited women and devastated communities, all for the sake of profit. Petitioner now basically asks the Court to eliminate obscenity as a RICO predicate and to eviscerate the racketeering provisions of 18 U.S.C. § 1961 et. seq. on the basis of two new theories. First, petitioner alleges that he is somehow proscribed from future exercise of his First Amendment "speech" rights as a result of forfeiting "communicative" assets directly derived from or related to organized criminal activity -- in this instance, the dissemination of explicit hard-core pornography depicting sadomasochism, anal intercourse, torture, group sex, etc. Second, petitioner also claims that this forfeiture, indeed almost *any* forfeiture, constitutes a violation of the Eighth Amendment's proscription of "cruel and unusual punishment," in essence arguing that the racketeering and obscenity violations of which he was convicted are minor infractions. On both assertions, as a matter of constitutional law and clear reading of the facts of this case, petitioner's appeal must be rejected.

The racketeering provisions of 18 U.S.C. § 1961 et. seq. were promulgated to provide government with a strong and realistic weapon against organized crime. Nowhere is the law more needed than to stop the organized criminal enterprises which produce and market obscenity as their third-leading money maker on an international basis. RICO's own legislative history and current law enforcement reality reveal that the majority of hard-core pornography entities are highly organized, utilize multiple fronts, corporate shells and absent directors to hide ill-gotten assets, operate in multiple jurisdictions on a cash, often tax-free, basis and employ intimidation, violence and deception to maintain control. These enterprises have grown exponentially as a result of local law

enforcers' inability to shut down the continuing criminal activity with repeated fines and short jail sentences. As a result, such law enforcement "nuisances" have become a minor incidental cost for the continuing criminal enterprises. The undisputed purpose of RICO is to *stop* multiple criminal activities by jailing the organizers for longer periods, and by forfeiting the organizations' assets which facilitated and encouraged greater criminal involvement. The lower courts, with extremely rare exception, have extended significant latitude in the application of criminal RICO forfeiture provisions against such defendants as petitioner.

The central factor in the instant case is the petitioner's stark inability to separate the concept of forfeiting "communicative" material used in a racketeering enterprise as a *punishment and deterrent* for organized criminal activity from the *prohibition* of future dissemination of presumptively protected material. Petitioner has not been barred *whatsoever* from disseminating "communicative" material in the present or future. He has simply been enjoined from utilizing ill-gotten assets which have a direct nexus to his racketeering enterprise in the dissemination of any future material.

Incredibly, while petitioner seeks to carve out a special exemption for himself and obscenity as a predicate to RICO forfeiture, he flatly refuses to recognize any constitutional concern that his exemption will likewise protect drug cartels, organized gangs or terrorist organizations from hiding their assets as "media businesses" or presumptively protected material. While no law, including RICO, should ban the future exercise of First Amendment rights, no category of racketeering activity should enjoy immunity from forfeiture of ill-gotten assets which are connected to organized criminal activity. Moreover, the impact of such forfeiture on a subsequent exercise of First Amendment rights is negligible. Any criminal enterprise, including hard-core pornography

kingpins and drug lords, are relieved of some *ability* to produce and distribute "communicative" material upon conviction - whether as a function of jail, monetary fines/seizure or forfeiture of assets and materials which may be considered "communicative."

Petitioner's argument that obscenity-based racketeering entities be granted a unique exemption from RICO forfeiture will, if accepted, create a *direct* and *compelling* incentive for organized crime to invest all of their ill-gotten assets in "communicative" entities - specifically cash based, hard-core pornography enterprises which are already well suited to evade taxes. To advocate that those who repeatedly and intentionally violate the law, but do it while involved in a "communicative" business, enjoy a safe harbor for assets acquired through heinous crimes and are immune to RICO is absurd. Taken to its logical conclusion, this absolutist approach to the First Amendment would necessarily eliminate all "communicative" predicates to RICO including mail, wire and security fraud, child pornography, perjury and conspiracy.

That the RICO predicate acts are obscenity violations rather than mail fraud or drug violations is irrelevant. The purpose of RICO forfeiture is "not to restrain the future distribution of presumptively protected speech but rather to disgorge assets acquired through racketeering activity" 4447 *Corporation v. Goldsmith*, 504 N. E. 2d 559, 565 (Ind 1987); rev'd on other grounds *sub. nom. Ft. Wayne Books Inc. v. Indiana*, 489 U.S. 46 (1989); or to "divorc(e) guilty persons from the enterprises they have corrupted." *U.S. v. Cauble*, 706 F. 2d 1322, 1350 (5th Cir. 1983), *cert. denied* 465 U.S. 1005 (1984).

Petitioner's claim that the size of his forfeiture, fine and prison sentence is disproportionate to the crime and thus violative of the Eighth Amendment proscription against cruel

and unusual punishment fails miserably when reviewed under the three part analysis provided in *Solem v. Helm*, 463 U.S. 277 (1983). In fact, recently the Court stated in *Harmelin v. Michigan*, 111 S. Ct. 2680, 2705 (1991), that "it forbids only extreme sentences that are 'grossly disproportionate' to the crime" and "(o)utside the context of capital punishment, successful challenges. . . [will be] exceedingly rare," *Solem v. Helm*, 463 U.S. at 289-290.

Despite petitioner's attempt to trivialize the gravity of obscenity offenses by continual references to his inventory as "adult erotica," an overwhelming body of scientific evidence and law enforcement data indicates that these materials are significant contributors to the commission of rape, sexual violence, and child molestation. There is nothing "adult" about pandering sexually violent materials and there is nothing "erotic" about facilitating the sexual abuse and degradation of a woman, child or man for profit. The punishment was entirely consistent, if not too lenient, for the gravity of petitioner's offense, which helped contribute to the risk of sexual assault for millions of women and children.

ARGUMENT

I. RICO FORFEITURES OF "COMMUNICATIVE" ENTITIES INVOLVED WITH RACKETEERING ACTIVITY IS FULLY CONSTITUTIONAL

A. Punishment For Past Criminal Racketeering Activity And Future Deterrence Is Fundamentally Different Than Proscriptions Against Future Communications

Petitioner's argument that the forfeiture of racketeering-related assets which are "communicative" entities is unconstitutional is without merit. His flawed analysis rests on

an inexplicable failure to distinguish forfeiture as a punishment and deterrent for past organized criminal activity from a proscription of disseminating future expressive material. As the Ninth Circuit recently stated in *Adult Video Association v. Barr*:

[D]efendants simply have no First Amendment right to use the profits and proceeds from trafficking in obscenity to finance their constitutionally protected speech.

960 F. 2d 781, 790 (9th Cir. 1992). The purpose of forfeiture is "not to restrain the future distribution of presumptively protected speech but rather to disgorge assets acquired through racketeering activity" *4447 Corporation v. Goldsmith*, 504 N. E. 2d 559, 565 .

Remarkably, petitioner's argument that the forfeiture of racketeering-related assets is impermissible where the forfeited property includes "communicative entities" rests entirely on cited cases in which the situation constituted a prior restraint or prohibited the future exercise of a First Amendment right. However, the RICO forfeiture in this case,

does not restrain the activities of a person or business in the future; it only takes from them assets that they have accumulated before conviction. Under the schemes at issue here, the convicted person or business is not enjoined from and is legally free to engage in the production and distribution of any expressive material after the forfeiture -- even though expressive material may have been seized.

American Library Association v. Thornburgh, 713 F. Supp. 469, 486 (D.D.C. 1989); see also *United States v. Pryba*, 674 F. Supp. 1504 (E. D. VA. 1987), 900 F. 2d 748 (4th Cir.) cert. denied, 111 S. Ct. 305 (1990); *4447 Corporation v. Goldsmith*, 504 N.E. 2d at 565; *Arizona v. Feld*, 745 P. 2d 146 (Ariz. App. Ct. 1987) cert. denied, 485 U.S. 977 (1988).

A brief review of the cases petitioner cites to support his contention underscores his flawed reliance on these cases. For example, he cites a series of cases for support which are solely prior restraint cases where materials were seized or speech was halted before any determination was made as to its illegality or harmfulness. See *Vance v. Universal Amusement Co.*, 445 U.S. 308, 316 (1980) (prior restraint impermissible because speech was not yet ruled illegal); *Quantities of Copies of Books v. Kansas*, 378 U.S. 205, 210 (1964) (no prior hearing determining obscenity before seizure was ruled unconstitutional); and *Marcus v. Search Warrant of Property*, 367 U.S. 717, 731 (1961) (warrant to seize alleged obscene materials was impermissible because there were virtually no procedural safeguards). However, as the Ninth Circuit Court of Appeals underscored, these "prior restraint cases do not stand for the proposition that harmful speech can never be punished." *Adult Video Association v. Barr*, 960 F. 2d. at 789. See *Kingsley Books Inc. v. Brown*, 354 U.S. 436, 444-445 (1957) (after finding certain books obscene, the court enjoined defendant from future dissemination of these books as a penalty, not a prior restraint) and *Sequoia Books Inc. v. Ingemunson*, 901 F. 2d. 630, 636 (7th Cir.) cert. denied, 111 S. Ct. 387 (1990) (Court found Illinois forfeiture law was not an attempt to regulate sale of protected materials or to close bookstores, but simply to punish defendant for past obscenity convictions).

Second, petitioner claims that if an obscenity violation had occurred in *Arcara v. Cloud Books, Inc.*, 478 U.S. 697 (1986), the Court would have demanded First Amendment scrutiny. In reality, the Court indicated that if the ability to disseminate First Amendment material was hindered, then "close scrutiny" would be required. The huge distinction between these two perspectives is painstakingly ignored by the petitioner. In the instant case, the imposition of the RICO forfeiture removed the petitioner's ill-gotten gain, but in no way interfered with his future right to exercise his First Amendment prerogative.

Third, petitioner uses *Ft. Wayne Books v. Indiana* to support his premise by stating that this Court held that a pre-trial seizure of presumptively protected material is unconstitutional, if the purpose of the seizure is to "put an end to the sale of obscenity." 498 U.S. 46, 67 (1989). However, in the present case petitioner did not face a pre-trial confiscation of his materials. The seizure came only after 1) a jury trial in which he was found guilty of racketeering and 2) after a forfeiture hearing was conducted under the "beyond the reasonable doubt" standard. These "safeguards" remove petitioner's case completely from his analysis under *Ft. Wayne Books* and leave us with a punished "racketeer" who is still able to exercise his First Amendment rights in the future, albeit, with a little less panache.

Fourth, petitioner equates the facts in *Simon & Schuster Inc. v. Members of the New York State Crime Victims Board*, 112 S. Ct. 501 (1991) to the instant case. Once again, the fact that petitioner is not precluded from exercising the First Amendment rights in this case is ignored. *Simon & Schuster*, which held unconstitutional the Crime Victims Board's attempt to disallow monetary gain from the "fruits of the crime" under New York's "Son of Sam" law, infringed upon the exercise of present First Amendment rights. However, in

this case, where the assets of racketeering activity involved forfeiture of communicative property, there is no usurpation of a present right to exercise a First Amendment prerogative and at best only a negligible impact upon any future exercise.

In short, the "Son of Sam" law in *Simon & Schuster* created a financial disincentive to exercise present speech rights by "singl[ing] out income derived from expressive activity for a burden the State places on no other income," and by targeting "only ...works with a specified content." 112 S. Ct. at 508. By contrast, the RICO forfeiture provisions do not create a financial disincentive to speak or write, nor do they target present expressive activities whatsoever; they merely "preclude ...defendants from using assets derived from [racketeering] to subsidize future speech," *Adult Video Association v. Barr*, 960 F. 2d. at 790.

The petitioner is also not helped by his wrongful reliance on *Near v. Minnesota*, 283 U.S. 697 (1931) which is advanced to buttress the main thrust of petitioner's entire argument. *Near* involved a Minnesota law which provided that the publication or sale of "malicious, scandalous and defamatory" periodicals were a nuisance and could be enjoined. The Court in *Near* held that such a law acted as a prior restraint because the newspaper was permanently enjoined from publishing and conducting any further business under its own name and title. Unlike the RICO forfeiture provisions in the instant case, the purpose behind the Minnesota statute in *Near* "[was] not punishment... but suppression of the offending newspaper or periodical." -- simple prior restraint. 283 U.S. 697, 711 (1931). Contrary to *Near*, the petitioner here is free to engage in any First Amendment protected activity after the forfeiture. The communicative material in this case was forfeited simply because it was an asset used in the racketeering enterprise, not for the purpose of suppressing it. When one compares the

situation in *Near* with a forfeiture of communicative entities involved in racketeering activity, it is clear why the Fourth Circuit explained in *United States v. Pryba*, 900 F. 2d at 754-755, "*Near* has no application to obscenity and sheds no light" on the question of the constitutionality of RICO Forfeiture in obscenity cases.

All the above reviewed cases are easily distinguishable from the petitioner's case because they directly hinder or prohibit the exercise of present and future First Amendment rights, while the RICO Forfeiture in the instant case simply punishes prior criminal acts. In spite of the petitioner's protestations to the contrary, it was recently settled by this court that using obscenity violations as predicate acts in RICO is constitutional. *Ft. Wayne Books, Inc. v. Indiana*, 489 U.S. 46 (1989). In *Ft. Wayne Books*, the Court recognized that the prison sentence and fine authorized by the state RICO statute at issue was more severe than those authorized for a simple obscenity offense. As a result, some book sellers might "practice self-censorship and remove First Amendment protected materials from their shelves." 489 U.S. at 60. The Court held, however, that "deterrence of the sale of obscene materials is a legitimate end of state anti-obscenity laws." *Ft. Wayne Books*, 489 U.S. at 60. Further, the Court concluded that "any form of criminal obscenity statute applicable to a bookseller will induce some tendency to self censorship and have some inhibitory effect on the dissemination of materials not obscene." *Id.*, quoting *Smith v. California*, 361 U.S. 147, 154-155 (1959).

The analysis in *Ft. Wayne Books*, which concluded that obscenity violations are viable predicate acts, is the same as applied to the RICO forfeiture provisions at issue here. Each of the lower courts which have examined this precise issue have concluded that any possible "chilling effect" from obscenity-based RICO forfeiture, like from obscenity

predicates, is an "inevitable consequence of the criminal law's legitimate efforts to deter and to punish obscenity." *Adult Video Association v. Barr*, 960 F. 2d at 786. The Ninth Circuit further explained that "[b]ecause a RICO forfeiture occurs only after a criminal trial on the obscenity issue, with its full panoply of procedural protections, the forfeiture represents punishment for engaging in obscenity rather than a prior restraint." 960 F. 2d at 789. In a similar case in which it discusses whether the fines levied as a result of an obscenity violation would chill First Amendment rights, the Ninth Circuit again concluded that "whatever chill may arise from Arizona's felony fine system, properly understood, is attributable to the state's legitimate deterrent goal." *Polykoff v. Collins*, 816 F. 2d 1326, 1340 (9th Cir. 1987).

Apparently, petitioner in this case simply does not want to be held accountable for his criminal actions, no doubt because he finds himself ensnared in a web of racketeering which has now left him with significantly less resources and in prison. Hopeful that the "smoke and mirrors" approach of pleading a violation of his freedom of speech will confuse the issue, petitioner continually mixes punishment and prior restraint without making any distinction.

This Court, however, is faced with the same basic problem that the Ninth Circuit faced in *Polykoff* when they concluded that "those who conduct their affairs close to the boundary of proscribed activity necessarily incur some risk" *Polykoff*, 816 F. 2d at 1340. A forfeiture penalty is no more chilling than a prison sentence or a fine, in that if the indictment in the present case was only for obscenity offenses, petitioner would have been subject to 60 years imprisonment and a fine of \$3 million – a prospect at least as "chilling" as the RICO forfeiture imposed here. The Eighth Circuit Court of Appeals in the instant case stated, "we reject Alexander's argument that the forfeiture provisions have an

unconstitutionally chilling effect on First Amendment rights." *Alexander v. Thornburgh*, 943, F. 2d 825, 834, (8th Cir. 1991). This Court should likewise firmly reject the same notion.¹

Finally, in a case closely on point, the Fourth Circuit in *United States v. Pryba*, 900 F. 2d 748 (4th Cir.) *cert. denied*, 111 S. Ct. 305 (1990), held that RICO forfeiture is a legitimate criminal punishment and deterrent. Specifically addressing the possibility of seizing communicative material, the Court held that "forfeiture... does not violate the First Amendment even though certain materials, books and magazines that are forfeited may not be obscene and in other circumstances would have constitutional protection." *Pryba* 900 F. 2d at 755. The Court goes on to state that the establishment of a "nexus...between defendants ill-gotten gains from their racketeering activities and the presumptively protected material" is all that is required to forfeit the entire enterprise. *Id.*

In sum, there are four distinct reasons for criminal sanctions: 1) punishment, 2) deterrence, 3) rehabilitation, and 4) warehousing. While it is obvious that the forfeiture provisions of RICO are not intended for rehabilitation and warehousing of the defendant, it is also clear that they are intended for punishment and deterrence. Punishment is accomplished by confiscating the proceeds and the property obtained through the illegal racketeering activity. Deterrence is

¹ Petitioner's assertion to the Court that RICO forfeiture of his racketeering-related "communicative" entities is unconstitutional because it "deprived [the public] of most of the local media outlets for obtaining constitutionally protected erotic materials," Pet. Brief at 30, is patently false. A basic survey of Minneapolis/St. Paul businesses identifies dozens which are actively involved in the commercial dissemination of hard-core pornography and hundreds more in the business of disseminating "erotic" materials.

achieved by sending a clear message to those contemplating criminal enterprises that all one gains through racketeering activity is in jeopardy of being confiscated by the government. "The purpose of the [RICO] forfeiture is to strip the defendant of the tools and profits of criminal conduct and thereby terminate the criminal enterprise." *Adult Video Association v. Barr*, 960 F. 2d at 790. In short, "crime does not pay."

Prior restraint, on the other hand, is a prohibition. It differs greatly from criminal sanctions in that prior restraint does not look to what has been done, but what might be done. No action by the government has interfered with petitioner's freedom to exercise his First Amendment rights and the petitioner is free to disseminate any non-obscene communicative material he chooses. He may take full advantage of his right to speak freely. It is intellectually dishonest to deny the difference between the instant case, in which RICO forfeiture punishes and deters criminal activity, and those cases which prohibit prior restraint. RICO forfeiture of any entity is intended solely for punishing and deterring organized crime activity and is not intended to be a prior restraint, or even a prohibition, on future dissemination of presumptively protected material. At best, RICO forfeiture of petitioner's racketeering-related assets may prove to be a hindrance, albeit a negligible one, simply because it has removed his *ability* to use his ill-gotten assets to engage in such dissemination.

B. RICO And Its Forfeiture Provisions Are Critical To Any Realistic Law Enforcement Against The Organized Crime Controlled Obscenity Industry

"Organized crime involvement in pornography is indeed significant and there is an obvious national control, directly and indirectly, by organized crime figures in the United States.

Few pornographers can operate in the United States independently of involvement with organized crime".

Final Report of the Attorney General's Commission on Pornography at 1070-1071 (1986). This conclusion by the 1986 Commission on Pornography adopted the Federal Bureau of Investigation's analysis done in 1978. The FBI analysis uncovered numerous organized crime activities associated with pornography, including prostitution, gambling, murder, acts of violence, extortion, illegal guns and public corruption. According to the Los Angeles Police Department, "organized crime infiltrated the pornography industry in Los Angeles in 1969 due to its lucrative financial benefits. By 1975, organized crime controlled 80 percent of the industry and it is estimated that this figure is between 85 to 90 percent today." 1986 Commission on Pornography, *Los Angeles Hearing Volume I*, Robert Peters, page 32. Cited in the *Final Report of the Commission on Pornography* at 1048-1049.

Racketeering provisions of 18 U.S.C. § 1961 et. seq. were promulgated to provide government with a strong and realistic weapon against organized crime. Since obscenity is estimated to be organized crime's third leading money maker and is distributed on an international basis there are few, if any areas, where RICO and its forfeiture provisions are more badly needed and appreciated than in the highly organized pornography industry. The jury in this case found, beyond a reasonable doubt, that *Alexander* violated three of the four subdivisions of Title 18 U.S.C., Section 1962, which are the basis of the racketeering counts. The jury further found that *Alexander* violated the federal obscenity laws on 12 separate occasions involving four magazines and 3 videotape cassettes which form the predicate acts.

From the government's statement of facts, it is clear that the petitioner utilized numerous corporate shells, multiple fronts, fictitious names and absent directors to secrete his true identity and ownership, as well as his ill-gotten assets from government discovery. It is also clear from the record that the magnitude of petitioner's hard-core pornography business (which he now values before this Court at more than \$25 million in assets despite earlier claims of under \$10 million) was formidable to any local law enforcement group. He would not have been effected by short jail terms for the clerks or small fines to the corporate entities. In fact, prior to obscenity becoming a predicate for federal RICO in October 1984, few federal authorities or state law enforcers would even attempt to investigate or prosecute such a complex and massive organized criminal entity, since the cost would far outweigh any potential of ever stopping the organized criminal activities. The main purpose of RICO was to stop multiple criminal activities engaged in by such large enterprises by jailing the organizers for longer periods and by forfeiting the organization's assets which facilitated and encouraged greater criminal involvement. One hundred and twenty witnesses, 700 Exhibits and three months of trial were needed to substantiate petitioner's simple but extensive deception and complex organization. His case firmly underscores the difficulty of utilizing normal criminal laws against such a large, organized criminal organization.

In the case at bar, RICO and its forfeiture accomplished what no other criminal obscenity or tax law has achieved in 30 years - it brought a stop to the multiple criminal violations which were perpetrated by and through the petitioner's organization. "It may be true that stiffer RICO penalties will provide an additional deterrent to those who might otherwise sell obscene material, ... but deterrence of the sale of obscene materials is a legitimate end of state anti-obscenity laws." *Ft. Wayne Books, Inc. v. Indiana*, 489 U.S. at 60.

Thus, the very purpose of obscenity-based RICO has had the desired effect from its first application in *Pryba* to the instant case. Entire organizations have been stopped, with millions of dollars of assets forfeited and decades of criminal activity halted. Without RICO and its forfeiture provisions, these illegal enterprises would continue to prosper and grow, with no remedy for concerned citizens, communities and law enforcers in sight.

C. The Only Requirement Necessary For Forfeiture Of A "Communicative" Entity Is Any Nexus Between Property And The Criminal Enterprise's Racketeering Activity

As we have discussed, the petitioner was convicted of 3 of the 4 subdivisions of racketeering under Title 18, U.S.C., § 1962 along with 12 counts of obscenity violations and numerous tax violations. The jury found that petitioner gained influence over various enterprises he was involved in through the millions of dollars generated per year from his pornography business and, thus, forfeited the ill-gotten gain of his criminal enterprise to the government. In the forfeiture order entered in this case, the district court found that all the forfeited property constituted either proceeds of racketeering activity, substantially facilitated the racketeering activity, or supported the RICO scheme by providing the means and methods of transporting and selling obscene material. Pet. Brief at 59. Such an order is within the clear purview of 18 U.S.C. § 1963, (a)(1) (assets which petitioner had acquired and maintained from racketeering activity), 18 U.S.C. § 1963 (a)(2) (assets which afforded him a source of influence over the enterprise) and 18 U.S.C. § 1963 (a) (3) (assets which constituted or were derived from proceeds he had obtained directly or indirectly from the racketeering activity). On a facial challenge to the RICO forfeiture, however, the Ninth

Circuit decided in *Adult Video Association v. Barr* that "those assets or interests of the defendant invested in legitimate expressive activity being conducted by parts of the enterprise *uninvolved* or only *marginally involved* in the racketeering activity may not be forfeited." 960 F. 2d at 791 (emphasis added). The court permitted forfeiture of "assets actually used in connection with the obscenity offense -- that is used to produce market or move obscenity through interstate commerce, and assets and interests substantially financed, directly or indirectly, by the proceeds of the criminal activity." *Id.*

While we disagree with the Ninth Circuit's constitutional conclusion, it is clear that an order of forfeiture in the instant case does not appear to fall outside the permissible scope of forfeiture even under the *Adult Video Association v. Barr* ruling. Moreover, it does not fall outside the scope of the clear meaning of the words in 18 U.S.C. §§ 1962-1963. In *Ft. Wayne Books*, the Court addressed the post conviction forfeiture question when it said, "[w]e assume without deciding that bookstores and their contents are forfeitable (like other property such as a bank account or a yacht) when it is proved that these items are property actually used in, or derived from a pattern of violation of the State's obscenity laws." 489 U.S. at 65. The stores from which the obscene videos and magazines were sold are certainly a central part of the enterprise and thus, *all* the petitioner's inventory is forfeitable. See *United States v. Littlefield*, 821 F. 2d 1365, 1367 (9th Cir. 1988).

Second, the bank account, real estate and other items forfeited also appear to come from the proceeds of the petitioner's business and were so adjudicated by a judge and a jury using the "beyond a reasonable doubt" standard. "The RICO forfeiture is *in personam*: a punishment imposed on a guilty defendant deprives that defendant of all the assets that

allow him to maintain an interest in the RICO enterprise regardless of whether those assets are themselves tainted by the use and connection with the racketeering activity." *United States v. Cauble*, 706 F. 2d 1322, 1349 (5th Cir. 1983). Even in *Adult Video Association*, a case petitioner relies upon heavily, the appellate court states, "thus, unlike prior restraint, it is the defendant's unlawful conduct (dealing in obscenity) rather than the defendants anticipated speech that sets into motion a RICO forfeiture." 960 F. 2d at 790. See *American Library Association v. Thornburgh* 713, F. Supp. 469, 486 (D.C. Cir. 1989) (forfeiture does not restrain the activity of the person or the business in the future; it only takes from them assets that they have accumulated before conviction). Thus, this court should not disturb the jury and court's finding that any communicative assets which have a *nexus* with the criminal enterprise's racketeering activity for which petitioner was convicted should be forfeited. A diminution in scope of RICO forfeiture will dilute the statute's deterrent effect and significantly risk a continuation of the criminal enterprise.

Finally, the most troubling aspect in the instant case is the petitioner's claim is that a sliding scale should be employed when proving a nexus between forfeitable property and the criminal enterprise when obscenity is involved. In essence, according to the petitioner's theory, the number of racketeering acts which must be proven in a RICO obscenity case is different from other RICO cases and is directly proportional to the scale of the enterprise itself.

Petitioner further argues that the larger the seizure the higher the government's burden of proof. Pet. Brief at 21-22. Thus, when taken to its logical conclusion, the larger and more diverse a criminal organization becomes, the less likely would be the possibility of a successful RICO forfeiture action. In short, this is a clever guise to persuade this Court to rule that businesses involved in "communicative" material are immune

from RICO forfeiture provisions. As petitioner elaborates, "even if one assumed that every single book and videotape in a forfeited store were obscene, the forfeiture of the real and personal property used in or necessary for dissemination of future presumptively protected expression would still, and in every case suppress the business' ability to engage in future presumptively protected expression." Pet. Brief at 30. In essence, the petitioner sees no time when removing the instrumentalities of a crime is appropriate for people involved in even obscenity trafficking, let alone forfeiting "communicative" assets directly involved in racketeering activity.

Two lower courts have easily seen through the absurdity of petitioner's argument.

To follow the defendant's argument would allow criminals to protect their loot by investing it in newspapers, magazines, radio and television stations. Carried to its logical end, this reasoning would allow the Colombian drug lords to protect their enormous profits by purchasing the *New York Times* or the Columbia Broadcasting System.

Pryba, 900 F. 2d at 755; *Adult Video Association v. Barr*, 960 F. 2d at 790. Despite the petitioner's insistence that only those items specifically adjudicated as obscene can be forfeited, this court should adopt the more reasoned view that "the fact that some of the materials forfeited are not obscene does not protect them from forfeiture when the procedures established by RICO are followed. *Pryba*, 900 F. 2d at 756. "Differentiating between those parts of a RICO enterprise engaged in racketeering activity and those that are not is not a requirement under this statute for determining whether

defendant's interest is subject to forfeiture" *United States v. Walsh*, 700 F. 2d 846, 857 (2nd Cir.) *cert. denied*, 464 U.S. 825 (1983); *United States v. Anderson*, 782 F. 2d 908, 917 (11th Cir. 1986) (entire building confiscated even though a completely innocent and unrelated business entity rented the basement). Furthermore, "properties that are owned by a RICO participant and used by him to further the affairs of the RICO enterprise afford the owner/participant a source of influence over the enterprise and thus are subject to forfeiture" *United States v. Zielie*, 734 F. 2d 1447, 1459 (11th Cir. 1984) *cert. denied sub. nom.*, *United States v. Gustafson*, 469 U.S. 1189 (1985). Under the RICO provisions of 18 U.S.C. § 1962 and the case law, all of the petitioner's forfeited property in the instant case meets the standards necessary for RICO forfeiture.

D. Creation Of A Special Exemption For "Communicative" Entities From RICO Forfeiture Will Provide Compelling Incentive For Organized Crime To Invest All Ill-Gotten Assets In This Newly Protected Category

The first step in the petitioner's attempt to seduce the Court into creating a special exemption for all "communicative entities" as immune from RICO forfeiture is his claim that any effect on "communicative material" is violative of the First Amendment. In an attempt to support his proposition the petitioner cites numerous types of state action which specifically restricted expressive activity such as padlocking a business where obscenity offenses occurred in the past or revoking a business license because of the obscenity violation. See *Vance v. Universal Amusement Company*, 445 U.S. 308 (1980) and *City of Paducah v. Investment Entertainment Inc.*, 791 F. 2d 463 (6th Cir.) *cert. denied*, 479 U.S. 915 (1986); *Arcara v. Cloud Books*, 478 U.S. 697 (1986); *Gayety Theaters Inc. v. City of Miami*, 719

F. 2d 1550 (11th Cir. 1983); *Entertainment Concepts Inc., III v. Maciejewski*, 631 F. 2d 497 (7th Cir. 1980) *cert. denied*, 450 U.S. 919 (1981); *State v. Bauer*, 768 P. 2d 175 (Ariz. App. Ct. 1988), *cert. denied*, 493 U.S. 1042 (1990). However, none of these cases prohibits the forfeiture of racketeering-related assets which involved communicative materials protected by the First Amendment.

For example, in *Vance v. Universal Amusement Company*, 445 U.S. 308 (1980) the Court struck down a future prohibition against a movie theater that was being restrained from showing movies due to prior problems with obscene films. However, the missing procedural safeguards required by the Court in *Vance* were present in *Alexander*, where the RICO forfeiture did not occur until after the jury "beyond a reasonable doubt": 1) convicted petitioner of numerous predicate offenses, 2) convicted defendant of racketeering activity and 3) found a nexus between the forfeited property and the racketeering activity. Even the Ninth Circuit Court in *Adult Video Association* acknowledges "the protections contained in the criminal RICO prosecution -- such as the allocation of the burden of proof, heightened standard of proof and adversariness -- satisfy Bantam's commands." 960 F. 2d at 789 citing *Bantam Books, Inc. v. Sullivan*, 372, U.S. 58 (1963).

In *Arcara*, which involved the forfeiture of a bookstore used as a front for prostitution, this Court distinguished between prior restraints and legitimate punishments by acknowledging that bookstore owners were free to disseminate communicative materials in the future (just as petitioner is) and that the forfeiture itself is only a punishment for prior bad behavior. 478 U.S. at 705. "Neither the press nor book sellers may claim special protection from governmental regulations of general applicability simply by virtue of their First Amendment protected activities." *Id.*

If the Court adopts this illogical and dangerous argument that "communicative" assets are immune from RICO forfeiture, drug lords and other organized criminals would waste no time in investing in businesses like bookstores, newsstands, publishing houses and broadcasting entities thus insulating their criminal proceeds from seizure. *Pryba*, 900 F. 2d at 755; *Adult Video Association v. Barr*, 960 F. 2d at 790. Moreover, hard-core pornography businesses would then become a perfect shielded "communicative entity" for organized crime to invest its money since they are already set up to ideally facilitate their tax evasion. Thus, creation of such a special exemption will not only shield organized crime's assets from any RICO forfeiture but will also exacerbate the growing \$8-\$10 billion a year pornography industry to the ultimate harm of children, women and communities who suffer from their blight.

E. Any Absolutist View That Supports A Forfeiture Exemption Of "Communicative" Assets Would Logically Also Eliminate All "Communicative" Predicate Acts of RICO Including Mail, Wire And Security Fraud, Child Pornography And Conspiracy

Petitioner attempts to convince the Court to carve out a special exemption from racketeering forfeiture for himself and hard-core pornography enterprises. However, there is no logical distinction between obscenity-based racketeering and racketeering predicated on any other *illegal*, but arguably "communicative," racketeering predicate. These would necessarily include mail, wire and security fraud, child pornography, perjury and conspiracy, each of which is "communicative" in nature and a predicate to RICO statutes. In spite of petitioner's implication otherwise, engaging in

activity in violation of obscenity statutes simply has no protected element.

For instance, there is no functional difference between child pornography and obscenity as a predicate for RICO forfeiture. The two differ only in their subjects and the specific victims of the criminal acts. Both involve engaging in an activity that has *no* protected expressive element.

Simply put, petitioner's view of the First Amendment is **absolute** and completely unrecognizable in the precedents of this Court. It would require setting aside entire categories of criminal activity from any threat of effective law enforcement. It would also offer almost total protection for criminal obscenity enterprises which now flourish in spite of the law in every region of the United States.

II. APPLICATION OF RICO FORFEITURE TO PETITIONER'S ASSETS DOES NOT VIOLATE THE EIGHTH AMENDMENT PROHIBITION AGAINST CRUEL AND UNUSUAL PUNISHMENT

A. Forfeiture of Petitioner's Property Is Consistent With *Solem v. Helm* 3-Part Analysis And Not Grossly Disproportionate To The Crime

When petitioner's sentence and forfeiture is reviewed under the three-part analysis provided in *Solem v. Helm*, it is consistent with both the Eighth Amendment's proscription of "cruel and unusual" punishment and the gravity of the petitioner's offense. As the Court recently stated in *Harmelin v. Michigan*, 111 S. Ct. 2680, 2705 (1991), "it forbids only extreme sentences that are 'grossly disproportionate' to the crime" and "[o]utside the context of capital punishment, successful challenges. . . [will be] exceedingly rare," *Solem v. Helm*, 463 U.S. at 289-290.

Petitioner argues before the Court that an aging man was unfairly stripped of his 30-year-old business for distributing several relatively harmless video tapes and magazines. He implies that the scope of his obscenity and racketeering violations were minor as a direct function of the number of items found obscene during trial. He makes not a single mention of the specific content of the unprotected obscene videotapes or magazines, providing no evidence in support of their implied harmlessness.

First, petitioner's age is irrelevant to any consideration of the severity of his crime. *All* members of society are expected to adhere to the law and *all* are subject to punishment if they fail to obey the law. Second, virtually all criminal racketeering enterprises that have been dismantled as a result of RICO forfeiture have been so disassembled by relatively small portions of their illegal enterprises coming to the surface.

For example, a drug dealer who is arrested selling over a gram of cocaine on two separate occasions can be prosecuted under the racketeering laws and find himself separated from his wealth. Likewise, a person involved in mailing fraudulent material can be required to forfeit all he possesses for mailing only a few letters involving small amounts of money. Each of these examples would appropriately be subject to the same procedural scrutiny that was afforded petitioner's case. Like petitioner, if they were found to have engaged in a pattern of criminal activity, their property that was shown to have a nexus to the criminal enterprise would be subject to forfeiture. Petitioner's claim that he "believed" the illegal material he distributed extensively was protected has been spoken to already by the jury and is meritless.

In *Solem v. Helm* the Court has provided the three-step analysis necessary to decide if the Eighth Amendment has been violated:

- (1) A comparison of the gravity of the offense and the harshness of the penalty,
- (2) A comparison of the sentence imposed for the same or similar offenses, and
- (3) A comparison of the sentence imposed for the same or similar offenses in other jurisdictions.

Solem v. Helm, 463 U.S. 277 (1983). However, the court also provided a strong proviso on the review when it noted that the court may only consider, "whether the sentence... is within constitutional limits." 463 U.S. at 290 N. 16.

In the instant case, the petitioner had a business empire that, by his own admission, consisted of numerous hard-core pornography outlets providing thousands of videotapes and magazines. Petitioner even claims that his holdings were worth in excess of \$25 million. The jury in their deliberations concluded that a nexus existed between the petitioner's criminal enterprise and these assets.

The first prong of *Solem v. Helm* requires a comparison of the crime with the punishment. The obscene materials were distributed through most (if not all) of the forfeited properties and the inventory seized, while not adjudged obscene, was of a similar character (sexually explicit in nature). The government was prepared to offer into evidence additional magazines and videotapes, yet appellant's counsel objected on grounds of relevance. Appellee's Brief at 35. Finally, the machinery and the funds seized were adjudged either materials used in furtherance of the criminal enterprise or proceeds from the criminal enterprise. The jury verdict indicated that the racketeering activity and the criminal

enterprise was significant and therefore authorized a significant forfeiture.

The second prong of *Solem v. Helm* requires a comparison between penalties for the same or similar offense. A similar case has recently been concluded in Las Vegas in which Reuben Sturman, whose criminal racketeering enterprise is akin to petitioner's, was given a very similar punishment. Sturman was fined significantly (\$1 million), he was sentenced to substantial jail time (4 years) and significant amounts of property were confiscated (approximately \$10 million in property). It should be noted that the *Sturman* case was heard in the Ninth Circuit, where *Adult Video Association v. Barr* was adjudicated. Despite this, petitioner cites *Adult Video Association* numerous times in an attempt to convince this Court to strike down the jury's verdict.

The final prong of *Solem* is met by reviewing *Arcara*, 478 U.S. 697 (1986) (the entire bookstore was confiscated), *Walsh*, 700 F. 2d 846 (2nd Cir.) *cert. denied*, 464 U.S. 828 (1983) (defendant's entire interest in an engineering firm was confiscated), *Littlefield*, 821 F. 2d 1365 (9th Cir. 1987) (entire 40 acres of property seized despite the fact that only a portion was used to grow marijuana), *Cauble*, 706 F. 2d 1322 (5th Cir. 1983) (the defendant's entire interest in Cauble Enterprises was forfeited), *Anderson*, 782 F. 2d 908 (11th Cir. 1986) (an entire building used in the enterprise was confiscated even though part of it was definitely not involved), *Zielie*, 734 F. 2d 1447 (11th Cir. 1984) *cert. denied, sub. nom., United States v. Gustafson*, 469 U.S. 1189 (1985) (all of defendant's property and money that had a nexus to drug dealing was forfeited), and, of course *Pryba*, 900 F. 2d 748 (4th Cir.) *cert. denied*, 111 S. Ct. 305 (1990) (the defendant's entire interest in businesses, including real estate, money and "communicative" material forfeited).

The petitioner implies in his brief that he was given a "harsh" penalty but a comparison with his possible sentence indicates otherwise. Petitioner faced a possible 171 years in prison and fines totaling \$6.4 million. He received a jail term of 6 years and a fine of \$100,000. Furthermore, the evidence clearly demonstrated that petitioner had other sources of income, including movie theaters and real estate. In addition, the income from these properties was traceable to AB Distributors, petitioner's primary business, which the government never sought to forfeit despite the jury's finding of a nexus.

The jury in *Alexander* was bound by the highest standard in American jurisprudence when exploring not only the question of petitioner's guilt but also the nexus between the property and the criminal enterprise. This court should "[hold] that the forfeiture prescribed by 18 U.S.C. §1963 is neither cruel nor unusual, and the Eighth Amendment does not prohibit its application." *United States v. Thevis*, 474 F. Supp. 134, 141 (N.D. Ga. 1979) *aff'd*, 665 F. 2d 616 (5th Cir.) *cert. denied, sub. nom., United States v. Evans*, 456 U.S. 1008 (1982).

B. Petitioner's Larger Agenda To Trivialize Obscenity As An Insignificant Crime Is Exposed As Nonsense When The Overwhelming Evidence Of Its Harm And Victimization Is Examined

Petitioner's brief makes not a single reference to the specific content of the obscene materials he was found guilty of distributing through his massive racketeering enterprise. He describes his inventory variously as "erotic materials," "adult erotica," "communicative," "media items," "expressive," "erotic speech," etc. Pet. Brief at 3, 4, 5, 6, 7, 11, 20. He refers specifically to the materials found obscene, beyond a reasonable doubt, by a jury of his peers as "erotic

magazines and videotapes." Pet. Brief at 40. Lastly, having struggled to only reference the obscene material with patently ridiculous euphemisms, petitioner presumptively asserts, without offering a shred of scientific evidence, that "obscenity [is] a victimless and relatively nonserious crime." Pet. Brief at 45. The only support offered by petitioner for this assertion is that the pornographic materials he panders are popular and sell well. His argument is directly analogous to a drug kingpin who asserts that because the cocaine he sells is popular and lucrative, selling it is therefore *victimless* and a *relatively nonserious offense*.

In just the past five years, materials involved in obscenity prosecutions have included the mutilation and burning of genitals, the sexual torture of "models" dressed as children, bestiality, rape, the forcing of inanimate objects (baseballs, cans, etc.) up the torn rectums of victims, sadomasochism, etc. Titles prosecuted have included "Bleed Little Girl Bleed," "Little Boy Snuffed" and "Taboo" (incest).

Materials introduced into petitioner's trial included "Leather Sleaze," "Ass Masters Special #3" and "Hot Slut Orgies." Petitioner himself asserts that the content of the materials he panders are "indistinguishable" from thousands of other (heinous) materials currently panders in the hard-core pornography market. Pet. Brief at 46.

An *overwhelming* body of scientific evidence and law enforcement data indicates that these materials (hard-core and child pornography) are significant contributors to the commission of rape, sexual violence, and child molestation. Despite petitioner's inconceivable assertions otherwise, there is nothing "adult" about pandering sexually violent materials and there is nothing "erotic" about facilitating the sexual abuse and degradation of a woman, child or man for profit.

The relationship of pornography to child sexual abuse is compelling. A recent study of arrests for sex crimes against children (extrafamilial child sexual abuse cases) from 1980-1989 revealed that pornography was discovered in eighty-eight percent (88%) of cases, with child pornography recovered in over twenty-three percent (23%) of the cases. According to the study, "Clearly pornography is an insidious tool in the hands of the pedophile population. The study merely confirms what detectives have long known: that pornography is a strong factor in the sexual victimization of children." Ralph W. Bennett, "The Relationship Between Pornography and Extrafamilial Child Sexual Abuse," *The Police Chief*, 19 (February 1991).

A 1983 study by Dr. William Marshall found that eighty-seven percent (87%) of the molesters of girls and seventy-seven percent (77%) of the molesters of boys admitted to regular use of pornography. W. Marshall, *Report on the Use of Pornography by Sexual Offenders*, Report to the Federal Department of Justice, Ottawa Canada (1983).

With respect to rape, the statistics and studies mirror those that examine the issue of child sexual abuse. Eighty-six percent (86%) of rapists studied admit to consumption of hard-core pornography, with fifty-seven percent (57%) admitting imitation of actual scenes from the material in the commission of their crimes. W. Marshall, *Use of Sexually Explicit Stimuli by Rapists, Child Molesters and Non-Offenders*, 25 J. of Sex Research 267 (1988). Dr. James Mason, current head of the U.S. Public Health Service, noted after his examination of the impact of pornography:

[P]ornography is a serious social threat. When pornography becomes influential culturally, and especially when it begins to shape attitudes and habits, we see respect for people erode,

violence becomes more acceptable, and marital commitments deteriorate. Pornography creates a fantasy world where people are of secondary importance. Pornography is enslaving for some and makes victims of others. It is not, as the literature of the 1970's argued, a "victimless" crime. Furthermore, among fair-minded men and women, the harm of pornography is not controversial. It is clear that its effects on *society*, the *family*, and the *individual* are overwhelmingly and quantitatively adverse.

J. Mason, *The Harm of Pornography*, Speech Transcript, pub. by U.S. Department of Health and Human Services (October 1989).

Petitioner's punishment was entirely consistent, if not too lenient, for the gravity of petitioner's offense, which helped contribute to the risk of sexual assault for millions of women and children in the United States. It is unconscionable that despite the gravity of these offenses, he continues to assert even before this Court that his crimes are "victimless."

CONCLUSION

The Eighth Circuit Court of Appeals' decision in the present case should be upheld because it is imperative that organized criminal enterprises be effectively combated. The best weapon available to the government to end decades of unrestrained obscenity-based racketeering is the RICO forfeiture provision, and it should not be weakened by carving out a judicial sanctuary for criminal enterprises simply because they are involved with "communicative" material.

Respectfully submitted,

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APPENDIX

APPENDIX**DESCRIPTION OF AMICI****The Religious Alliance Against Pornography**

The Religious Alliance Against Pornography ("RAAP") was founded in July, 1986 by Dr. Jerry Kirk, President of the National Coalition Against Pornography, His Eminence Joseph Cardinal Bernardin, Archbishop of Chicago and dozens of senior religious leaders who gathered in New York to address the role of hard-core and child pornography in a wide range of health, safety, and moral concerns. These included the relationship of pornography to child molestation, sexual violence, sexually transmitted diseases, rape and human exploitation.

RAAP members include highest-level leaders in the Roman Catholic, Jewish, Protestant, Greek Orthodox and Mormon communities. Collectively, they serve over one-hundred million citizens throughout the United States. RAAP is likely the broadest religious alliance to ever address any social concern in the United States.

Believing that the human person is created in God's image and likeness, and that human life is sacred, RAAP leaders address a broad range of life threatening and life diminishing issues within their faith groups. The purpose of RAAP is to bring into clear focus hard-core and child pornography's role in the assault on human dignity and the consequent dehumanization and abuse that it promotes. The devastating impact of hard-core and child pornography is the one issue that has drawn an immense variety of faiths and traditions together in agreement.

While continuing to strongly support and respect the freedoms of speech and expression as guaranteed by the First Amendment, RAAP members are in unanimous agreement that obscenity and child pornography, which are not protected by the Constitution, are life-endangering evils which must be eliminated.

As religious leaders, RAAP's primary objective is to teach and to motivate. As teachers, RAAP leaders use their pulpits and influence to proclaim the truth of human dignity and freedom, and to promote the God-given human values needed for the moral health of society.

RAAP supports the objectives of the National Coalition Against Pornography and the National Law Center for Children and Families and their efforts to pass and strengthen obscenity and child protection laws. It is also active on an international basis, helping facilitate efforts in Asia, Europe and South America to stem the role of pornography in the abuse and degradation of children, women, men and families.

In summary, RAAP is working to (1) create public awareness of pornography's destructive impact on society, to (2) help citizens in community and government leadership understand the moral, physical and social dimensions of sexual exploitation and illegal pornography, and (3) motivate citizens and faith groups to take appropriate action and responsibility in this regard.

The National Coalition Against Pornography

The National Coalition Against Pornography ("N-CAP") was founded in 1983 by Dr. Jerry R. Kirk to respond to the devastating impact of illegal obscenity and child pornography on America. N-CAP holds that these materials have a direct relationship to the skyrocketing incidence of rape, sexual

violence and child molestation in the United States. Numerous respected studies confirm this opinion.

N-CAP works to increase public awareness of the harm caused by obscenity and child pornography and to implement a number of programs designed to eliminate them from our society.

These programs include educational/training seminars designed to teach citizens and law enforcement officials how to rid their communities of illegal obscenity and child pornography. Other programs include: victim service development training; citizen coalition development and training; legal and law enforcement training on obscenity and child pornography investigations and prosecutions; extensive resource development and distribution, including a wide range of research reports documenting the harm of obscenity and child pornography; expert testimony for federal and state legislatures that are considering stronger obscenity and child protection laws. N-CAP founder, Dr. Jerry Kirk, provided testimony before both the U.S. House of Representatives and U.S. Senate in support of the Child Protection and Obscenity Enforcement Act of 1988.

Each of N-CAP's programs is active on a national basis, with specific involvement in dozens of local cities at any given time. N-CAP has also been instrumental in the development of a number of other related groups.

The fundamental mission and purpose of N-CAP is in protecting children and families through the elimination of child pornography and obscenity. N-CAP was formed as a result of a group of local citizens and clergy in Cincinnati, Ohio who had seen and counseled firsthand hundreds of families devastated by illegal pornography. N-CAP has provided substantial efforts nationwide in support of the

prosecution of obscenity-predicated RICO cases, including the case before the Court.

National Law Center for Children and Families

National Law Center for Children and Families ("National Law Center") is a Washington D.C. metro based organization dedicated to the protection of children and the preservation of families through the enforcement of existing laws and the promulgation of new legislation against illegal pornography and sexual exploitation.

Through the legal staff, resource library, and publications, the National Law Center actively participated in assisting courts, prosecutors, investigators, legislators, public officials, researchers, and parents to stop illegal pornography and its concomitant harms of sexual exploitation of children, women, and families.

Consultation with many county, city and civic leaders around the nation allows the National Law Center to assist in the drafting and enactment of new legislation. This legislation concerns obscenity, child pornography, materials harmful to minors and the appropriate time, place and manner regulation of sexually oriented businesses. The National Law Center is also involved in the dissemination of vital educational information about the extent and harm of pornography and sexual exploitation to legislators, law enforcement, public officials and concerned citizens alike.

Training seminars, newsletters, research data, updated prosecutors' manuals and on-site assistance are part of the National Law Center's strategy. This strategy is dedicated to equipping law enforcement with the necessary information, pleadings, and legal techniques necessary to win the war for our children and families.

The National Law Center has participated in numerous Amici Curiae briefs in cases that have a direct impact on children and family issues, including the recent Supreme Court cases of *Osborne v. Ohio* and *Jacobson v. United States*. Presently, the National Law Center is involved in publishing training materials and reference manuals on child sexual exploitation and child pornography. Its legal staff has conducted legal and law enforcement training for thousands of investigators and prosecutors since 1984.

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No. 91-1526

Supreme Court, U.S.

FILED

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OFFICE OF THE CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1992

Ferris J. Alexander, Sr.

Petitioner,

v.

United States of America

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF OF NATIONAL FAMILY LEGAL
FOUNDATION AND CHILDREN'S LEGAL
FOUNDATION AS AMICI CURIAE IN
SUPPORT OF THE UNITED STATES

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CONSENT OF THE PARTIES

Attorneys for Appellant and Appellee have consented to the filing of an amici curiae brief by National Family Legal Foundation and Children's Legal Foundation.

INTEREST OF AMICI CURIAE

National Family Legal Foundation ("NFLF") is a non-profit legal organization founded in 1990. The Foundation exists to assist public officials in the enforcement and drafting of constitutional obscenity and child pornography laws. It also provides legal assistance to victims of pornography.

NFLF's former Executive Director, Alan E. Sears, was also the Executive Director of the Attorney General's

Commission on Pornography. In that capacity he oversaw and supervised the drafting of the Final Report of the Attorney General's Commission on Pornography, which listed as Recommendation Number 1 that "Congress should enact a forfeiture statute to reach the proceeds and instruments of any offense committed under the Federal Obscenity laws."

Children's Legal Foundation ("CLF") is a national, non-profit, public interest corporation based in Phoenix, Arizona. CLF has a 35-year history of opposing child pornography and obscenity, having filed more than 50 amicus curiae briefs with this Court on virtually every major obscenity and child pornography issue in the past three decades.

NFLF and CLF seek to file an amicus curiae brief in support of the United States in this case. Both are

concerned with the toll illegal pornography takes on society
and believe that RICO forfeiture is a necessary and
constitutional method of combatting this problem.

SUMMARY OF ARGUMENT

- I. THE PURPOSE OF RICO IS TO FIGHT ORGANIZED CRIME. MOST OBSCENITY IN THE UNITED STATES IS DISTRIBUTED BY ORGANIZED CRIME. THUS THE USE OF RICO, AND THE RESULTING FORFEITURE OF ASSETS, IS SUPPORTED BY THIS PURPOSE.
- II. THE PURPOSE OF RICO FORFEITURE IS NOT TO RESTRAIN PROTECTED SPEECH, BUT RATHER TO DISSOLVE CRIMINAL ENTERPRISES BECAUSE OF PAST CRIMINAL CONDUCT.
- III. RICO FORFEITURE DOES NOT CREATE AN UNCONSTITUTIONAL PRIOR RESTRAINT.
- IV. APPELLANT'S SENTENCE WAS NOT CRUEL AND UNUSUAL PUNISHMENT UNDER THE EIGHTH AMENDMENT.

LAW AND ARGUMENT

I. THE USE OF RICO WITH OBSCENITY
OFFENSES IS SUPPORTED BY THE PURPOSE
OF RICO AND PASSES MUSTER UNDER THE
U.S. CONSTITUTION.

Congress and various state legislatures¹ have added obscenity to their RICO statutes in order to fulfill the goals of RICO -- fighting organized crime -- not as a device to suppress protected material or to chill protected speech.²

Several reports, including the California Attorney General's 1987 Report on Organized Crime in California and the Final Report of the Attorney General's Commission

¹ Approximately fifteen (15) states currently have RICO statutes which include obscenity as a predicate offense.

² CONG.REC. § 433-458 (daily edition, Jan. 30, 1984) (statement of Sen. Helms). Senator Helms, in introducing the amendment that added "dealing in obscene matter" to the federal RICO statute, put into the record material showing the profits organized crime gains from the sale of illegal obscenity, and reiterated that RICO was intended to provide "a means of dealing with organized crime." *Id.* at § 433.

on Pornography, have concluded that organized crime is behind most of the production and national distribution of illegal, obscene pornography. The California report estimated that nationwide revenues from pornography range from \$7 billion to \$10 billion annually, "and organized crime is believed to be connected to most of this money." Attorney General's Report on Organized Crime in California at 7 (1987). It also concluded that "pornography was a lucrative part of organized crime operations" in California in 1986. Id. The Attorney General's Commission on Pornography endorsed the FBI's 1978 findings that:

... organized crime involvement in pornography ... is indeed significant, and there is an obvious national control directly, and indirectly, by organized crime figures of that industry in the United States. Few pornographers can operate in the United States independently without some involvement with organized crime. The huge profits gathered by organized crime in this area and redirected to other lucrative forms of crime, such as

narcotics and investment in legitimate business enterprises, are certainly cause for national concern ...

Final Report of the Attorney General's Commission on Pornography, at 1071 ("Final Report"). These conclusions were important factors in the decisions of Congress and various states to amend their RICO statutes by including obscenity as a predicate offense.

Indeed, this Court has recognized that the purpose of the federal RICO statute is "to provide new weapons of unprecedented scope for an assault upon organized crime and its economic roots." Russello v. United States, 464 U.S. 16, 26 (1983). Its provisions are to be construed liberally to bring about its remedial purposes. United States v. Turkette, 452 U.S. 576 (1981). One of the most important of those remedies is the forfeiture of assets. Russello, supra.

- A. The purpose of RICO is not to restrain protected speech. Any impact on speech is incidental to lawful non-speech related enforcement activities.

The record herein makes clear that the government's purpose is not to use RICO to restrain future expressive activities, but to seek the dissolution of an illegal "enterprise" or forfeiture of property because of past criminal conduct. The penalties are imposed for reasons unrelated to the suppression of speech. See Fort Wayne Books, Inc. v. Indiana, 489 U.S. 46 (1989).

Appellant's (hereinafter "Alexander") activities are precisely the type of criminal enterprise for which RICO legislation was adopted. The Court of Appeals in Alexander v. Thornburgh, 943 F.2d 825, 827-829 (8th Cir. 1991) details Alexander's business operation -- fraudulent corporations, sham business dealings, the commingling of funds, money laundering, and tax evasion.

This is simply business as usual in the pornography industry. The Attorney General's Commission reported that:

The nature of the pornography business provides inviting opportunities for skimming on every level The often "cash only" business creates immense opportunities to launder money received from other organized crime activity Layers of corporations and hidden transactions of all descriptions are used by organized crime families involved in pornography to conceal true ownership and activities.

Final Report, at 1060, 1064.

Further, there is no question that Alexander has long been involved with organized crime, at least since 1970. This was detailed in the Final Report, at pages 1200-1202 (attached as Appendix A). Thus, despite Alexander's claim that the forfeitures in his case were disproportionate to the seven items found obscene, the industry and activities he developed are the exact type of criminal enterprise for which RICO statutes were intended.

RICO acts are designed as strong medicine against

the epidemic of organized crime involvement in the hard-core pornography racket, as they are in other activities of organized crime. The central theory of RICO is that the corruption of a business through crime, whether drugs, prostitution, arson, or obscenity, makes that enterprise subject to treatment as an unlawful depository of economic interests. Once corrupted, such an enterprise may be treated as having assets subject to forfeiture to prevent unjust enrichment from contraband. U.S. v. 37 Photographs, 402 U.S. 363, 376-77 (1977).

How an enterprise is proven to have been corrupted is unrelated to what type of enterprise it is. 4447 Corp. v. Goldsmith, 504 N.E.2d 559, 565 (Ind. S.Ct. 1987). The aim of forfeiture statutes is to prevent criminals from intentionally using a business scheme to make, launder, or dispense proceeds of illegal acts and to punish such unfair business practices by depriving them of their poison fruit.

B. RICO forfeiture does not create an unconstitutional prior restraint.

Alexander argues that the RICO forfeiture in this case -- the destruction of a "media business" -- constitutes an unconstitutional prior restraint. Appellant's Brief at 10. First, to call his chain of peep show booth operations, topless dancing clubs, and other sex shops, a "media business" and compare it to a "broadcast network" is innovative but highly misleading. The record is clear that Alexander for more than twenty years has been involved in the distribution of hard-core pornography, i.e., materials where sexual penetration is clearly visible, in violation of federal and most state obscenity laws. But no matter how Alexander wants to classify his business, the forfeiture here did not result in an unconstitutional prior restraint.

Section 18 U.S.C. 1963, provides for forfeiture to the United States of:

- (1) any interest the person has acquired or maintained in violation of section 1962;
- (2) any –
 - A) interest in;
 - B) security of;
 - C) claim against; or
 - D) property or contractual right of any kind affording a source of influence over;any enterprise which the person has established, operated, controlled, conducted, or participated in the conduct of in violation of section 1962; and
- (3) any property constituting, or deriving from, any proceeds which the person obtained, directly or indirectly, from racketeering activity or unlawful debt collection in violation of section 1962 (emphasis added).

The only property subject to seizure and forfeiture is that which has a nexus to the corrupt organization. It matters not that some of the property seized may be constitutionally protected.

The First Amendment is not violated when there is a nexus established between the ill-gotten gains from

racketeering activity and the protected materials forfeited. United States v. Pryba, 900 F.2d 748, 755 (4th Cir.), cert. denied, ____ U.S. ____, 112 L.Ed.2d 258 (1990). That connection was established here. The Court specifically and properly limited the forfeiture to profits, real estate, and businesses directly related to Alexander's interstate transportation and sale of illegal hard-core magazines and videos. 943 F.2d at 835. Alexander wishes this Court would ignore the jury's and trial court's finding -- beyond a reasonable doubt -- of his extensive illegal dealings and his control of this corrupt enterprise. Id. at 829. Rather, he desires the Court to focus on seven videos and magazines, in a vacuum, and ignore the overwhelming evidence that Alexander's illegal dealings go well beyond the sale of these specific items.

Once convicted, the criminal cannot protect his ill-gotten lucre by commingling and investing in a so-called "First Amendment" business. Otherwise, racketeers of all

persuasions would simply become publishers to avoid RICO forfeitures. See Fort Wayne Books, supra.

Obviously, some inconvenience to speech is caused by all criminal laws, including RICO. In every case where a person is imprisoned for distributing obscenity, the imprisonment limits that criminal's ability to distribute communicative material, as two justices of this Court noted in Vance v. Universal Amusement Co., 445 U.S. 308, at 320, 324 (1980) (Justices White and Rehnquist). See also Arcara v. Cloud Books, 478 U.S. 697 (1986) (" . . . every civil and criminal remedy imposes some conceivable burden on First Amendment protected activities.") But under Alexander's reasoning, a person could engage in the RICO predicate offenses of prostitution, restraint of trade, or trafficking in stolen property at a commercial establishment which also sells paperback novels, and this would immunize the establishment from forfeiture. This would obviously provide a loophole for organized crime to avoid the

intended impact of RICO and defeats the purpose of the statute.

This Court has repeatedly recognized that it does not abridge freedom of speech to make a course of conduct -- in this case racketeering -- illegal, even though the conduct is in some respect carried out by means of expression. Cox v. Louisiana, 379 U.S. 559, at 563 (1966) ["... it has never been deemed an abridgment of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written or printed." Quoting Giboney v. Empire Storage & Ice Co., 336 U.S. 490 at 502 (1949)].

Arcara v. Cloud Books, *supra*, is squarely on all fours. There, this Court upheld the closure of a pornography bookstore that was also used as a place of prostitution. The nuisance abatement legislation in Arcara was concerned with unlawful conduct and only incidentally

related to expression. This decision is directly on point: "Bookselling in an establishment used for prostitution does not confer First Amendment coverage to defeat a valid statute aimed at penalizing and terminating illegal use of premises." 478 U.S. at 707. So long as there is no "speech suppressive motivation or policy" shown in the enforcement of the RICO statute and resulting forfeiture, it is constitutional. 478 U.S. at 707, N.4 (emphasis added).

Because RICO is an attempt to compel forfeiture of property used in racketeering activity and not to restrain the future distribution of expressive materials, it does not violate the First Amendment. 4447 Corp., 504 N.E.2d at 565.

An unconstitutional prior restraint is not created simply because a person's speech is restrained or inconvenienced as the unintended and incidental result of a legitimate statute. Arcara, supra. As with most criminal statutes, every one of the predicate offenses under any

RICO statute can arguably result in incidental suppression of speech. This is particularly so if the property used in the racketeering activity is a store that sells expressive materials. As long as the legislation is directed at unlawful conduct, and not motivated by suppression of speech, [which was clearly the purpose of the statute found unconstitutional in Near v. Minnesota, 283 U.S. 697 (1931)], the purpose of the RICO forfeiture cannot be frustrated because the criminal activity is intertwined with expression.

II. THE EIGHTH AMENDMENT WAS NOT VIOLATED BY THE FORFEITURE OF ALEXANDER'S PORNOGRAPHY EMPIRE.

The forfeiture of Alexander's business assets was not cruel and unusual punishment prohibited by the Eighth Amendment. Contrary to his argument that obscenity is a "minor", "victimless and relatively nonserious crime" (Appellant's Brief, at 44-45) are the findings of the Attorney General's Commission on Pornography, which

documented the vast numbers of victims of the pornography industry. Also, his position ignores this Court's statements concerning the governmental interests involved in regulating obscenity:

These include the interest of the public in the equality of life and the total community environment, the tone of commerce in the great city center, and, possibly, the public safety itself. ... The sum of experience, including that of the past two decades, affords an ample basis for legislatures to conclude that a sensitive, key relationship of human existence, central to family life, community welfare, and the development of human personality, can be debased and distorted by crass commercial exploitation of sex.

Paris Adult Theatre I v. Slaton, 413 U.S. 49, at 58, 63 (1973). Further, this Court in Fort Wayne Books described obscenity as a "substantive" crime. 489 U.S. at 57.

Obscenity is a serious crime, closely controlled by organized crime, which imposes an enormous cost, seen and unseen, on American society. Considering the damage

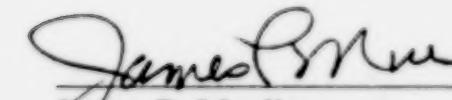
inflicted by illegal pornography and Alexander's long history of involvement in this "industry", his sentence seems highly appropriate.

CONCLUSION

For the above-stated reasons, the decision of the
Court of Appeals should be affirmed.

Dated October 29, 1992.

Respectfully submitted,

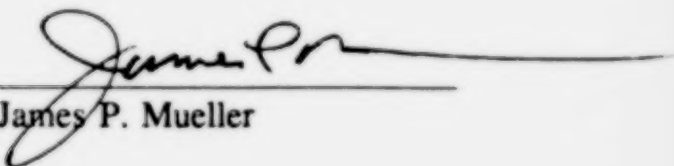

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CERTIFICATE OF SERVICE

I hereby certify that three copies of the foregoing
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Prepaid, on this 29th day of October, 1992, to:

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APPENDIX A

[Excerpt from pages 1200-1202 of the Attorney General's Commission on Pornography Final Report]

Zaffarano's businesses, Stu Segall & Associates and Miracle Film Releasing Company. Dominick Raffone, Michael Rizzitello (former member of the Joey Gallo LCN Family in New York), Jack LoCicero, James Fratianno and Thomas Ricciardo (member of the Joseph Columbo Family in New York) were indicted by a Los Angeles federal grand jury on charges of attempting to extort up to \$20,000 from local pornographers and a dummy pornography business set up by the F.B.I. Also, a known pornography distributor in Minneapolis, Minnesota, Ferris Alexander was stopped in Los Angeles, California, in the company of William Bittner, also known as William Haimowitz on February 11, 1974. On May 15, 1975, a truckload of pornographic materials was hijacked in St. Paul, Minnesota. The owner of the truck and person reporting the crime was Michael Kaplins

of 2014 Westchester, Baltimore, Maryland. At this time, Mr. Kaplins stated that the shipment was being shipped from Bon Jay Sales, 6601 Moravia Park Drive, Baltimore, Maryland, (formerly 600 Aisquith St., Baltimore, Maryland) to a party named Ferris and gave a phone number which was later traced to Ferris Alexander. On September 8, 1975, several cartons of pornographic booklets being shipped by Emery Air Freight broke open. Emery officials refused to deliver the shipment and notified federal and local authorities. The shipment was found to contain material displaying young children and adults in pornographic activity. The pornographic material [page 1200] was being shipped from Atlantic Distributors, #9 Ford St., Providence, Rhode Island, to Magazine Agency, 419 Hennepin Ave., Minneapolis, Minnesota, which is owned by Ferris Alexander.

In 1970, Ferris Alexander was convicted of interstate

transportation of obscene material in federal court, along with Samuel Manarite, a member of the Vito Genovese Family and Richard J. Portela. In 1972, Ferris was sentenced to Sandstone Penitentiary where he served 9 of 18th months and paid a \$20,000 fine.

An identified supplier of pornographic films to Alexander through correspondence, as indicated below, is William and Lewis Mishkin and their Motion Pictures, Inc., 1501 Broadway, New York, New York, dated November 12, 1975:

I hope that by now you have had your first playdate on the INTIMATE TEENAGERS, and that the results were as good as they have been all over the country.

I would appreciate learning when you will be through with the prints. I am not rushing you, but we have been considerably more successful, with this film that we had originally anticipated, and with the negative in Europe, this has caused us a print problem.

I have several other films that you might be interested in, including THE

FILTHIEST SHOW IN TOWN (Harry Reems
and Tina Russell), ADULT PLAYPEN.....

A partial list of recorded calls from Alexander's main warehouse at 20 North 14th St., Minneapolis, Minneapolis [page 1201] revealed telephone calls to several known businesses and individuals involved in the pornography industry such as Kenneth Guarino, William Mishkin, Stu Segall & Associates, Star Distributors, Ltd., David Grama, Robert Eugene Smith, Samuel Haimowitz, Lyndon Distributors, Bon Jay Sales, Inc., Norman Arno and the Mitchell Brothers Film Group.

Will Bittner was arrested for operating a warehouse in which 1.5 million dollars of hardcore pornographic material was confiscated. Also arrested with William Bittner was Anthony Zappi who is the secretary/treasurer of Teamsters Union 854 in New York City. William Bittner is currently operating the Lauderdale Beach Hotel, 101 S. Atlantic Blvd., Ft. Lauderdale, Florida. Donald Embinder

is the president of the hotel. Ronald Zappi is an employee, as well as Robert Barkow, who is also the production consultant for Blueboy Magazine.

Bittner also operates the Suki, Inc., dba Pojo, a hardcore pornography distribution business with his step brother Samuel Haimowitz. William Bittner stated to F.B.I. agents he sometimes used his step father's name, William Haimowitz. When the Suki warehouse was searched, it was established that they were doing a nationwide business. Records indicated that they were grossing \$40 to \$50 thousand per month on magazine sales alone. When added to their film distribution business, the estimates of their yearly sales was grossing about 1-1/2 million. The [page 1202]....

No. 91-1526

Supreme Court, U.S.
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In The
SUPREME COURT OF THE UNITED STATES
October Term, 1992

—O—

FERRIS J. ALEXANDER, SR.,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

-----*-----

On Petition For A Writ of Certiorari
To The United States Court Of Appeals
For The Eighth Circuit

-----*-----

BRIEF OF AMICUS CURIAE
FEMINISTS FOR FREE EXPRESSION
IN SUPPORT OF PETITIONER

-----*-----

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<i>Bantam Books v. Sullivan</i> , 372 U.S. 58 (1963)	34, 35
<i>Finley v. National Endowment for the Arts</i> , ___ F. Supp. ___ (C.D. Cal. 1992)	8
<i>4447 Corporation v. Goldsmith</i> , 479 N.E.2d 578 (Ind. App. 1985)	11-13
<i>Freedberg v. U.S. Department of Justice</i> , 703 F. Supp. 107 (D.D.C. 1988)	37
<i>Harmelin v. Michigan</i> , ___ U.S. ___, 111 S. Ct. 2680 (1991)	10
<i>Minneapolis Star & Tribune v.</i> <i>Minnesota Com'r of Revenue</i> , 460 U.S. 575 (1983)	11
<i>NAACP v. Button</i> , 371 U.S. 415 (1963)	11
<i>Near v. Minnesota</i> , 283 U.S. 697 (1931)	12
<i>Osborne v. Ohio</i> , ___ U.S. ___, 110 S.Ct. 1691 (1990)	22
<i>PHE, Inc. v. U.S. Department of Justice</i> , 743 F. Supp. 15 (D.D.C. 1990)	9, 37
<i>Playboy Enterprises, Inc. v. Meese</i> , 639 F. Supp. 581 (D.D.C. 1986)	32, 33
<i>Stanley v. Georgia</i> , 394 U.S. 557 (1969)	21-22

- United States v. PHE, Inc.*,
965 F.2d 848 (10th Cir. 1992). 38

Miscellaneous Authorities

- American Lawyer*, March 1988 36
- Attorney General's Commission on
Pornography and Obscenity,
Final Report (1986) 32-35
- Barrett, *Multiple Jeopardy? Porn Defendants
Face Indictments in Courts Far From
Their Home Bases*, *The Wall Street Journal*,
(July 27, 1990) 37-38
- Judith Becker and Ellen Levine, *Dissenting
Report, Attorney General's Commission
on Pornography* (1986). 27
- Margaret A. Blanchard, *The American Urge to Censor:
Freedom of Expression Versus the Desire
to Sanitize Society -- From Anthony Comstock
to 2 Live Crew*, 33 Wm. & Mary L. Rev. 741
(Spring 1992) 10, 11
- Varda Burstyn, ed., *Women Against Censorship*
(1985) 17
- Canadian Department of Justice, *The Impact of
Pornography: An Analysis of Research and
Summary Findings (Fraser Report)*, Working
Papers on Pornography and Prostitution,
Report No. 13 (1986) 26
- Esther Davidowitz, *The Breast-Feeding Taboo*,
Redbook (July 1992) 30
- Denver Post*, November 4, 1990 38

Edward Donnerstein, Daniel Linz and Steven Penrod, <i>The Question of Pornography: Research Findings and Policy Implications</i> (1987)	24
Feminist Anti-Censorship Task Force, <i>Caught Looking: Feminism, Pornography, and Cen- sorship</i> (1986)	17-18
Nan D. Hunter and Sylvia A. Law, <i>Brief Amici Curiae of Feminist Anti-Censorship Taskforce et al., in American Booksellers Association v. Hudnut, 21 J. of Law Reform</i> 69 (1988)	18-19
Burl Kutchinsky, <i>Pornography and its Effects in Denmark and the United States: A Rejoinder and Beyond, Comparative Social Research: An Annual</i> (1985)	25
John Money, <i>Paraphilias: Phenomenology and Classification</i> , 38 <i>American Journal of Psychotherapy</i> 175 (1984)	23
John Money, <i>Vandalized Lovemaps</i> (1989)	22
<i>New York Times</i> , May 1, 1986	27
<i>New York Times</i> , January 23, 1990	23
Marcia Pally, <i>Sense and Censorship: The Vanity of Bonfires. Freedom to Read Foundation, New York</i> (1991)	3, 8, 13-14, 20, 27
<i>Playboy Interview: Betty Friedan, Playboy</i> (September 1992)	17
<i>Report of the British Inquiry into Obscenity and Film Censorship (Williams Committee)</i> (1979)	25
<i>Report of the President's Commission on Obscenity and Pornography</i> (1970)	22

Janice M. Riordan and Emily T. Rapp, <i>Pleasure and Purpose: The Sensuousness of Breastfeeding</i> , <i>Journal of Obstetrical and Gynecological Neonatal Nursing</i> (March/April 1980)	29
Nadine Strossen, <i>The Convergence of Feminist and Civil Liberties Principles in the Pornography Debate</i> , 62 N.Y.U.L. Rev. 201 (1987). . .	19
Lawrence Tribe, <i>American Constitutional Law</i> (2d ed. 1988)	15
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INTEREST OF THE AMICUS

Feminists for Free Expression (FFE) is an organization of women who initially came together in January, 1992 in opposition to Senate Bill 1521, the "Pornography Victims' Compensation Act." It has since grown into a diverse organization of feminist women who share a commitment to preserving the individual's right and responsibility to read, view, and produce media materials of her or his choice, without the intervention of the government "for our own good."

FFE gained national recognition for its initial effort, a letter to the Senate Judiciary Committee protesting the third party liability provisions of S. 1521, which would allow crime victims to seek unlimited money damages from the producer or distributor of a book, magazine, or

film that victims believe to have caused the crime that harmed them. The FFE letter was signed by over 200 prominent women authors, activists, attorneys and scholars including Betty Friedan, Adrienne Rich, Nadine Strossen, Erica Jong, Nora Ephron, Jamaica Kincaid, and Judy Blume. (The text of this letter with a complete list of signatories is reproduced as Appendix A.)

Signatories of the FFE letter included several artists and writers who have felt the sting of censorship in recent years: Judy Blume, whose insightful and compassionate books for adolescents have won wide acclaim but have also spawned such controversy that she has recently been deemed the "most censored author in America"; Erica Jong, whose frank treatment of women's sexuality in her best-selling novels has likewise drawn fire; Karen Finley and Holly Hughes, feminist playwrights and actresses whose NEA grants were improperly denied for political reasons, as a federal court recently concluded in an exceptional decision ordering that their grants be restored.

As these artists and authors can attest, feminist expression is inherently controversial. Just as some would scapegoat erotic speech generally for a wide variety of social ills, feminist ideas have increasingly been blamed for social problems ranging from male unemployment to teenage pregnancy and "the decline of family values."¹ Indeed, any written or visual work which deals frankly with women's lives and sexuality is at risk in a climate of pervasive censorship.² Because the freedom to put forth those ideas and to combat ignorance regarding

¹ In what was hopefully the nadir of this scapegoating of women, for example, responsibility for the riots in Los Angeles was ascribed to television character Murphy Brown; her fictional portrayal of single motherhood was deemed to purvey the "unacceptable lifestyle" that happens to be shared by millions of American women.

² Works which have been officially or unofficially censored over the past few years, and which are threatened either directly or by the chilling effect of draconian censorship schemes like RICO forfeiture, include *The Diary of Anne Frank*, *Our Bodies, Ourselves*, Orwell's 1984, Desmond Morris' *The Naked Ape*, Alice Walker's *The Color Purple*, and films such as *Romeo and Juliet*, *Victor/Victoria*, and *A Passage to India*. See Marcia Pally, *Sense and Censorship: The Vanity of Bonfires* at 5-8 (Freedom to Read Foundation 1991).

sexuality is so essential to women's rights and well-being, FFE believes that it is particularly incumbent upon women to oppose censorship initiatives, especially those like RICO forfeiture which would decimate First Amendment protections for all Americans.

FFE opposes the government's use of this chilling and unconstitutional RICO forfeiture scheme in obscenity cases for the same reasons its members organized to oppose S. 1521. As the facts of this case vividly illustrate, RICO forfeiture is far worse than "book-burning by bankruptcy" (as FFE characterized the portended effect of S. 1521) -- it has enabled the government to stage an actual book-burning the likes of which this country has not seen in the two centuries since the Bill of Rights was ratified.

Because this particular censorial forfeiture flagrantly violates the First Amendment, because it sets such a dangerous precedent whereby government could stifle any disfavored speaker, bookstore or newspaper for even a single instance of unprotected speech,

and because feminist speech is especially vulnerable to the same censorial pressures, FFE submits this brief as *amicus curiae* to urge this Court to reject this pretext for censorship in the most unequivocal terms.

ARGUMENT**I. RICO FORFEITURES GRANT GOVERNMENT AN
ASTONISHING AND BLATANTLY UNCONSTITU -
TIONAL LIFE-AND-DEATH POWER OVER MEDIA
BUSINESSES.**

Feminists including FFE oppose the use of RICO forfeitures in obscenity cases, first and foremost simply as concerned American citizens. This draconian censorship scheme, whereby the government would arrogate the power of life and death over any communicative business it can convict of an obscenity offense, renders First Amendment freedoms insecure to an extent unprecedented in modern memory. If sustained, it would obliterate the well-established constitutional doctrines which until now have always been thought to prevent such free-wheeling censorship as has already occurred in this case.

By direct prosecutorial action and by chilling effect, federal RICO prosecution (and the countless state and local actions this precedent would encourage) would soon reduce the availability of materials dealing with sexuality to the vanishing point. The same limitless

governmental power applied in the context of other speech offenses would confine the entirety of discourse in this society to only that which is safe and uncontroversial.

Thus in its essence, this case has little to do with "obscenity." Rather, because of the unparalleled power this RICO forfeiture law gives government to censor *protected expression*, this case raises the essential question whether the First Amendment limits that power in any meaningful way. The government's theory that there is no such limit represents a cynical attempt to gain this Court's carte blanche approval for the complete suppression of material dealing with sexual themes, under the transparent guise of prosecuting obscenity *qua* "racketeering."

The history of the past few years certainly cautions against acceding to the government's implicit assurances that we can simply "trust them" with this limitless grant of power over the future of free expression in this country. Over the past few years, almost every passing week has brought a new threat of censorship.

The American Library Association's Office for Intellectual Freedom has reported that by 1989, book-banning had increased to three times the level of 1979.³

Although many recent instances of censorship may be attributed to private pressure groups or local officials (who indeed would be turned loose to censor at will by the precedent of RICO forfeiture), the federal government in particular has been in the forefront of the current campaign against sexual expression. Political pressures have adversely affected the integrity of the National Endowment of the Arts grant procedures, for example, with the result that feminist artists Holly Hughes and Karen Finley were defunded for strictly ideological reasons, a decision recently reversed in *Finley v. National Endowment for the Arts*, ___ F. Supp. ___, 1992 WL 130854 (C.D. Cal. 1992).

Even more dramatic have been the Justice Department's openly avowed attempts to stifle *protected sexual speech* by means of oppressive anti-

³ Pally, *supra* n. 2, at 5.

obscenity measures such as RICO forfeitures and multiple simultaneous indictments. Because of the government's demonstrable illicit intent to censor protected speech, not one but *three* federal courts have enjoined these stratagems. *See, e.g., PHE, Inc. v. U.S. Department of Justice*, 743 F. Supp. 15 (D.D.C. 1990) (enjoining multiple-district prosecutions upon a showing of governmental bad faith, including extortionate demands that plaintiffs cease distributing any sexually oriented material featuring "mere nudity" and other materials the government acknowledged to be protected by the First Amendment).

If this campaign against protected erotic expression were fueled by this Court's approval of RICO forfeitures, it would soon know no bounds. Nor would there remain any constitutional limitation on the power of federal, state or local officials to censor *any* sort of disfavored expression -- certain to include feminist ideas -- by means of the most death-dealing penalties for an endless list of speech-based crimes. Unfortunately, the long and inglorious

history of censorship in this country includes the suppression of literature such as *Ulysses* and *Lady Chatterly's Lover*, now recognized as classics but then condemned for their sexual themes, and the jailing of Margaret Sanger for disseminating information about birth control. See Margaret Blanchard, *The American Urge to Censor: Freedom of Expression Versus the Desire to Sanitize Society*, 33 Wm. & Mary L. Rev. 741 (1992). This history does not breed such confidence in government at any level that Americans should feel comfortable writing a blank check of censorial power. Yet that is precisely the power the use of RICO forfeiture in obscenity cases represents, and unless it is stricken, no speaker or media business including the broadcast networks and major newspapers will be safe from politically-motivated suppression.⁴

⁴ In *Harmelin v. Michigan*, ___ U.S. ___, 111 S. Ct. 2680, 2697 n. 11 (1991), Justice Scalia observed:

"We do not in principle oppose the 'parade of horrors' form of argumentation, . . . but its strength is in direct proportion to (1) the certitude that the provision in question was meant to exclude the very evil

The first court to decide the RICO forfeiture issue, the Indiana Court of Appeals in *4447 Corporation v. Goldsmith*, 479 N.E.2d 578 (Ind. App. 1985), *rev'd* 504 N.E.2d 559 (Ind. 1986), *rev'd sub nom. Fort Wayne Books, Inc. v. Indiana*, 489 U.S. 46 (1989),

represented by the imagined parade, and (2) the probability that the parade will in fact materialize."

On this basis, he rejected the argument that if the Court did not conduct proportionality review under the Eighth Amendment, "legislatures could 'mak[e] overtime parking a felony punishable by life imprisonment.'" *Id.*

In this case, however, there can be no doubt that "[p]rior restraints . . . strike to the core of the Framers' concerns," as Justice O'Connor observed in *Minneapolis Star & Tribune v. Minnesota Com'r of Revenue*, 460 U.S. 575, 583 n.6 (1983). And if, arguably, the overtime parking example strains credulity, it does so in a way that the government's potential uses of forfeiture and comparable remedies to silence disfavored speakers do not. Unfortunately, despite the First Amendment, our nation's history is marred with instances of censorship, including many in the past few years. See Blanchard, *The American Urge to Censor: Freedom of Expression Versus the Desire to Sanitize Society -- From Anthony Comstock to 2 Live Crew*, 33 Wm & Mary L. Rev. 741 (Spring 1992), The tendency of power to corrupt, and the fact that First Amendment freedoms "are delicate and vulnerable," as this Court noted in *NAACP v. Button*, 371 U.S. 415, 433 (1963), cautions against writing government a blank check of censorial authority.

emphatically rejected the notion that the state could forfeit or close entire media businesses for obscenity offenses, on numerous grounds including the fact that forfeiture operated as a classic prior restraint under *Near v. Minnesota*, 283 U.S. 697 (1931). In reaching this conclusion, the court stressed the vital First Amendment policy concerns which should also lead this Court to swiftly reject RICO forfeitures for obscenity:

"[RICO] statutes as applied to the predicate offense of obscenity inherently lend themselves to constitutional abuses both flagrant and insidious. . . . [P]rosecutors may employ the [RICO] provisions to padlock and seize the contents of one bookstore after another until by direct application of chilling effect, the state has entirely eradicated such establishments. Between the first such closure and the last we can draw no meaningful distinction.

"Moreover, the very 'neutrality' which the state claims for the impact of [RICO forfeitures] enhances the potential for their abuse. In the guise of a telling argument, the state concedes that the obscenity of the seized inventories of books, magazines and films is irrelevant and need not even be alleged. This argument . . . reveals the deeply-flawed nature of [RICO forfeiture] as a response to obscenity. May

avant-garde booksellers and theaters be padlocked and forfeited to the state upon a showing that alongside literary, political, and cinematic classics, they have twice disseminated controversial works subsequently adjudged to be obscene? . . . [T]he guarantees of the First Amendment mean nothing if the state may arrogate such discretion over the continued existence of bookstores and theaters." 479 N.E.2d at 601.

As the first court to consider this question observed so forcefully, deploying RICO forfeiture in obscenity cases is a frightening abuse of governmental power. If this Court does not sternly reject this unprecedented scheme of prior restraint, inescapably it will open a Pandora's Box of untrammelled censorship.

At stake here are the most fundamental of First Amendment concerns, which become critically important whenever the government would move to so broaden its power over the availability of officially-disapproved speech. As Marcia Pally has eloquently stated the problem in *Sense and Censorship: The Vanity of Bonfires*, *supra* n.2, at 9-10:

"When the state . . . restricts books, movies and music from the public, the nation loses the right and gradually the

ability to make up its mind about the information and entertainment it sees and hears, about the ideas it encounters now and what will be available for future use.

"Historian Henry Steele Commager wrote, 'Censorship . . . creates the kind of society incapable of exercising real discretion. . . . It will create a generation incapable of appreciating the difference between independence of thought and subservience.'

"[O]nce a nation surrenders the right to choose its books, music, and films, it has given away the right to mosey around in art, popular entertainment, and 'trash.' Some may argue that pornography and rock and roll are worthless and can well be done without. Others may say the same of detective novels, horoscope charts or fashion magazines. The idea behind the [First Amendment] is that one makes that determination for oneself."

The government's use and defense of RICO forfeitures in this case puts those First Amendment values in the gravest jeopardy, and must be rejected as the most patently unconstitutional, overbroad, and chilling restraint ever attempted in modern history.

II. EVEN IF THE CENSORIAL EFFECTS OF RICO FORFEITURE WERE LIMITED TO SEXUAL SPEECH, THIS LAW WOULD STILL FUNDAMENTALLY UNDERMINE FIRST AMENDMENT PROTECTION AND ADVERSELY AFFECT THE RIGHTS OF WOMEN.

At one level, the government's actions in this case have implications for First Amendment doctrine far beyond questions of "obscenity." At another level, however, this case very much concerns sexual speech, and as noted above the government has been forthright about its desires to suppress protected erotic expression.⁵ Even if the import of this case were limited to the question of pornography, many women and feminists would oppose RICO forfeiture as a disastrously harmful measure adverse to their interests.

⁵ In addition to this statute's patent overbreadth and unconstitutionality as a prior restraint, the government's overtly censorial motive represents yet another independent basis for striking down the RICO Act as applied to obscenity. As Professor Tribe has suggested, a law like RICO forfeiture should be deemed facially discriminatory because the circumstances manifest an "evident pattern of official action that a reasonably well-informed observer would interpret as suppressing a particular point of view." *American Constitutional Law* 820 (2d ed. 1988).

There is by no means a monolith of opinion among women or feminists regarding the harmfulness of pornography, and much less regarding the desirability of censoring it. Many women believe strongly that the suppression of sexual material will do women more harm than good, because it diverts attention away from the real sources of our problems and will inevitably result in the wide suppression of information about sexuality and reproduction so vital to women's well-being.

For these reasons, FFE was not the only women's organization to oppose S. 1521 -- several state chapters of the National Organization for Women, including those of Vermont, Michigan, New York, California, and Alabama, also expressed their opposition to the Senate Judiciary Committee. As censorship initiatives have increasingly targeted the works of artists like Robert Mapplethorpe, Holly Hughes and Karen Finley, the debate within the feminist movement has swung away from enthusiasm for such censorial laws. Recently, feminists like Betty Friedan have focused on the

connection between sexually-repressive censorship and the backlash against women in these economically troubled times. See "Playboy Interview: Betty Friedan," *Playboy* (September 1992).⁶

And indeed, such enthusiasm for censorship as may once have existed among some feminists was never so pervasive as the press coverage devoted to the Catharine MacKinnon/Andrea Dworkin movement has often implied. In the mid-1980's, important feminist works opposing their censorship initiatives appeared, such as the collection of essays in Varda Burstyn, ed., *Women Against Censorship* (1985), and the Feminist Anti-Censorship Task Force's similar series of essays, pointedly illustrated with erotic depictions, in *Caught Looking: Feminism, Pornography, and*

⁶ The appearance of this timely and important interview with one of the "Founding Mothers" of the women's movement highlights once again the fact that feminists rely upon freedom of the press in sexual matters in order to have fora for the expression of feminist ideas. We feminists like many others may read this issue of *Playboy* "only for the interviews," but the fact remains that without such sexually oriented publications, discourse regarding sexuality and gender issues in our culture would be much impoverished.

Censorship (1986). FACT's scholarly amicus brief in *American Booksellers Association v. Hudnut*, 771 F.2d 323 (7th Cir. 1985), *aff'd* 475 U.S. 1001 (1986), was instrumental in the court's formulation of and response to the complex First Amendment issues the Dworkin-MacKinnon ordinance raised, and the rejection of that law as impossibly vague and viewpoint-discriminatory. See Nan D. Hunter and Sylvia A. Law, *Brief Amici Curiae of Feminist Anti-Censorship Taskforce et al.*, in *American Booksellers Association v. Hudnut*, 21 J. of Law Reform 69 (1988) (hereinafter, "FACT Brief"). (For a selected bibliography of works pertaining to feminist opposition to censorship, see Appendix B.)

Women, including many feminists, have consistently opposed censorship in general and the suppression of pornography in particular for a number of reasons. Although some pornography contains negative imagery that feminists would certainly criticize, it also contains numerous positive images. Feminists defending free speech on sexual subjects have observed, for example, that pornography "may convey the

message that sexuality need not be tied to reproduction, men, or domesticity." FACT Brief, *supra*, at 30. Feminists have also noted that "there is a broad consensus among those who have studied it that much sexually explicit speech that is commonly labeled 'pornography' serves a variety of positive purposes," such as the treatment of sexual dysfunction, as even the Meese Commission acknowledged. Nadine Strossen, *The Convergence of Feminist and Civil Liberties Principles in the Pornography Debate*, 62 N.Y.U. L. Rev. 201, 205 (1987). Many couples and individuals use erotic materials as an aphrodisiac, or to improve their sex lives. *Id.*

In short, the materials suppressed in this case, and many others which would inevitably suffer the next blows of censorship if this Court were to uphold RICO forfeiture, are of value and interest to women. Indeed, video store marketing statistics reveal for example that by 1989, close to half of adult videotapes

were rented by women either alone or in couples.⁷

Thus many feminist artists, writers and attorneys have opposed censorship, believing both that blaming sexual materials for social problems distracts the nation from the *actual* sources of gender bias and violence, and that censoring those materials establishes dangerous precedents for suppressing women's speech and other speech of serious interest to women.

A. Sexually Oriented Depictions And Literature Do Not Cause Violence Against Women.

Based on the overwhelming weight of scientific research both in the United States and abroad, FFE rejects the premise that sexual materials "cause" violence against women. Rather, FFE believes that targeting words and images as the alleged cause of violence and sexism entails a double harm: it tends to exculpate those who in fact behave in a violent or sexist manner, and it more broadly diverts

⁷ See Pally, *supra* n. 2, at 67.

needed attention and resources from the true underlying causes of those ills.

Violence against women and male-dominated social institutions certainly flourished long before the availability of pornography as we know it, long before the advent of the printing press or motion pictures. They flourish today in countries like Iran, Saudi Arabia and China, where no sexual material or even Western music is permitted. Abolishing erotic words and pictures will no more cure the ills misguidedly ascribed to them than the similar scapegoating of "witches" in Europe and Colonial America meaningfully addressed the problems of those times.

Despite many attempts to do so, this Court has never been persuaded that erotic materials cause any tangible harms. In *Stanley v. Georgia*, 394 U.S. 557, 566 (1969), for example, this Court upheld the right of adults to possess even "obscene" materials in the privacy of their own homes, noting:

"Georgia asserts that exposure to obscene materials may lead to deviant sexual behav-

for or crimes of sexual violence. There appears to be little empirical basis for that assertion."

See also Osborne v. Ohio, 495 U.S. 103, 109-110 (1990).

Shortly after the decision in *Stanley*, the 1970 President's Commission on Obscenity and Pornography concluded its extensive studies of the relationship between sexually explicit behavior and anti-social behavior. The 1970 Commission concluded: "Empirical research designed to clarify the question has found no reliable evidence to date that exposure to explicit sexual materials plays a significant role in the causation of delinquent or criminal sexual behavior." 1970 Report of the President's Commission on Obscenity and Pornography at 139. That conclusion regarding erotic materials and violence has since been repeated by every reputable American study of the subject, and by a number of studies conducted in other countries.

Dr. John Money, director of the Psychohormonal Research Unit at Johns Hopkins University School of medicine, is considered by

many to be the world's leading expert on the subject. In his 1989 book *Vandalized Lovemaps*, he concludes that the derailed sexual impulses of rapists, child abusers, exhibitionists and the like result from childhood traumas; his research has yielded no evidence that sexually explicit material causes sexual crimes or aberrations. As Dr. Money stated his conclusions in the *American Journal of Psychotherapy*: "The fantasies of paraphilia are not socially contagious. They are not preferences borrowed from movies, books, or other people."⁸

Dr. Money also found that people with unusual or criminal sexualities were raised with strict anti-sexual, repressive attitudes. He observed in a *New York Times* interview that the "current repressive attitudes toward sex will breed an . . . epidemic of aberrant sexual behavior." *Scientists Trace Aberrant Sexuality*, *New York Times*, January 23, 1990.

⁸ *Paraphilias: Phenomenology and Classification*, 38 *American Journal of Psychotherapy* at 175 (1984).

Leading researchers Drs. Edward Donnerstein, Daniel Linz and Steven Penrod have likewise found no causal link between pornography and violence or other anti-social behavior; they attribute the aggressive effects of exposure to violent pornography in their laboratory experiments to the *violent* content of the images, not the sexual content. They wrote in *The Question of Pornography: Research Findings and Policy Implications* 172 (1987):

"Should harsher penalties be leveled against persons who traffic in pornography? We do not believe so. Rather, it is our opinion that the most prudent course of action would be the development of educational programs that would teach viewers to become more critical consumers of the mass media. . . . [S]tricter obscenity laws are . . . more restrictive of personal freedoms than an educational approach. And, as we have noted, the existing research does not justify this approach."

Studies undertaken in other countries have also disavowed the conclusion that erotica causes social harms. In 1985, the University of Copenhagen's Institute of Criminal Science reported that in European countries where restrictions on sexually explicit materials have

been lifted, the incidence of violent sex crimes over the last twenty years has declined or remained constant.⁹

Neither the Canadian nor the British Commissions on pornography have found any link between sexual material and sex crimes. As the British Inquiry into Obscenity and Film Censorship wrote: "We unhesitatingly reject the suggestion that the available statistical information for England and Wales lends any support at all to the argument that pornography acts as a stimulus to the commission of sexual violence."¹⁰ The Canadian Department of Justice issued a similar report in 1986, known as the Fraser Report, which concluded: "There is no persuasive evidence that the viewing of pornography causes harm to the average adult, . . . that exposure causes the average adult to harm others, . . . that exposure causes the

⁹ Berl Kutchinsky, *Pornography and Its Effect in Denmark and the United States: A Rejoinder and Beyond*, in *Comparative Social Research: An Annual*, 1985.

¹⁰ *Report of the British Inquiry into Obscenity and Film Censorship* (Williams Committee) at 80 (1979).

average adult to alter established sex practices."¹¹

In short, there was simply no respectable scientific support for the Meese Commission's anecdotally-based conclusions, cloaked in "feminist" terms, that virtually all pornography is "degrading" to women and that this "degrading" material causes violence or other harms. The Meese Commission's own expert, Dr. Edna Einsiedel of the University of Calgary, wrote an independent review of the social science literature, and also found no causal link between pornography and sex crimes. The Meese Commission then turned to Surgeon General C. E. Koop and asked him to gather additional data. Koop conducted a conference of researchers and practitioners in the medical and psychological fields; his report also found no causal

¹¹ The Canadian Department of Justice, *The Impact of Pornography: An Analysis of Research and Summary Findings* (Fraser Report), Working Papers on Pornography and Prostitution, Report No. 13 (1986) at p. 94.

relationship between sexual material and violence.¹²

Two commissioners, Ellen Levine and Dr. Judith Becker, so disagreed with the Meese Commission's *Final Report* that they issued a dissenting report castigating the commission for the "paucity of certain types of testimony, including dissenting expert opinion." *Dissenting Report* at 4. They concluded: "No self-respecting investigator would accept conclusions based on such a study." *Id.* at 7. Dr. Becker, director of the Sexual Behavior Clinic at New York State Psychiatric Institute, told *The New York Times* (May 1, 1986): "I've been working with sex offenders for ten years and have reviewed the scientific literature, and I don't think a causal link exists between pornography and sex crimes."

Both women in particular and the quality of life in our society generally will suffer from censorship premised on the misguided notion that words and images are a significant cause of

¹² See Pally, *supra* n. 2, at 21.

violence and other social ills. First, such an approach diverts attention and precious resources away from the real underlying causes of violence. There is simply no reason to believe that erotica causes rape, any more than Murphy Brown's blessed event caused the Los Angeles riots. No matter how many "dirty pictures" or record lyrics are suppressed, unemployment, alcoholism, and the gender bias which pervades our society will continue to result in violence against women. Meanwhile, censorship becomes an ineffectual substitute for building shelters for abused women and other constructive measures. Inevitably, it will be turned against women who express controversial views as well as stifling the availability of information crucial to women's lives and health.

B. Women Need Freedom of Discussion Regarding Sexuality, and That Freedom Is Indivisible From Others' Freedom of Expression On Sexual Themes.

Ignorance and prejudice regarding women's sexuality is a dangerous and constant threat to women in very tangible ways. The current

passion for censorship and suppression of anything anyone might find "offensive" has already exacted deadly costs by impeding education efforts regarding the AIDS epidemic. Silence about sex and reproductive issues are extremely detrimental to women's quality of life and well-being; yet such silence will again become the norm if censorial laws of RICO's magnitude are allowed to stand.

The notorious difficulties lesbian mothers have faced in retaining custody of their children is a prime example of the effects of sexual ignorance and prejudice, but by no means an isolated one. Recently, for example, a young single mother in Otisco, New York was arrested and her infant daughter taken from her by welfare officials after she related to a social worker that she experienced feelings of sexual arousal while nursing the baby.¹³ She did not

¹³ Of course, as medical studies reveal, a physiological sexual response to nursing is completely normal. See Janice M. Riordan and Emily T. Rapp, *Pleasure and Purpose: The Sensuousness of Breastfeeding*, *Journal of Obstetrical and Gynecological Neonatal Nursing* (March/April 1980).

regain custody of her daughter for over a year. Esther Davidowitz, *The Breast-Feeding Taboo*, Redbook (July 1992), at 92.

History gives women every cause to suspect censorship in the name of "preserving the family" and enhancing women's safety. History teaches that censorial campaigns have been directed prominently if not primarily against those who advance ideas considered radical at the time; and notable examples for feminists include the imprisonment of Margaret Sanger for dispensing birth control information. Nor has that tendency abated in modern times; witness the obscenity trial of the Cincinnati Contemporary Arts Center and its director for daring to exhibit the controversial images of Robert Mapplethorpe's photographic genius, and the attempted defunding of the feminist work of Holly Hughes and Karen Finley.

To the extent that misogynist sexual speech offends women or others, the constitutionally acceptable answer is more and better counter-speech. FFE believes that there are positive

alternatives to censorship, alternatives which can enhance rather than negate constitutional liberties: such as combatting negative, alienating attitudes by educating media consumers to make critical choices, and creating more cinematic and literary treatments of sexuality from women's point of view.

The censorship alternative can only return our culture to darkness in matters of sexuality, reproduction, and gender role issues. In any such suppressive climate, women lose access to information about sex and about reproductive choice, whether by direct censorship or chilling effect.

Feminist expression on these topics was certainly viewed as incendiary and harmful when the women's movement began 25 years ago, and in large areas of the country it still is under attack. Because it is so controversial, feminist speech is particularly vulnerable to the sort of pressures brought to bear on distributors and producers by a statute like the RICO forfeiture scheme.

- C. Not Only Is RICO Forfeiture In Obscenity Cases Egregiously Unconstitutional On Its Face; Such Forfeitures Are Also Invalid As A Censorial Tool In The Government's Avowed Campaign To Censor Protected Erotic Expression.

The Justice Department has been engaged in an ever-widening campaign to eliminate all sexual expression from the marketplace, conducting a moral crusade unknown since the days of Anthony Comstock. RICO forfeitures are but one strategy among many the Justice Department has used in the past few years in its admitted efforts to suppress even *nonobscene* erotic speech.

This campaign began in earnest when the Attorney General's Commission on Pornography ("Meese Commission") was chartered to devise "more effective ways in which the spread of pornography could be contained."¹⁴ For approximately a decade prior to 1986, when the Meese Commission issued its *Final Report*, the fed-

¹⁴ See *Playboy Enterprises, Inc. v. Meese*, 639 F.Supp. 581, 583 (D.D.C. 1986). The Meese Commission's Charter added, rather oxymoronicly, that the commission should accomplish this censorial goal in a manner "consistent with constitutional guarantees."

eral anti-obscenity laws had gone virtually unenforced.¹⁵ During that period, sexually oriented entertainment had soared in popularity with the advent of the VCR medium. Ironically, these materials' vast popularity with the American public seemed to fuel the government's determination to suppress them.

Even before the Meese Commission published its *Final Report*, the publishers of *Playboy* and *Penthouse* magazines were compelled to bring suit to curtail its efforts to suppress nonobscene materials. In *Playboy Enterprises, Inc. v. Meese*, 639 F. Supp. 581 (D.D.C. 1986), the court sharply condemned the Commission's actions in communicating a threat to major distributors of those magazines that the Commission's *Final Report* would publically brand them as "distributors of por-

¹⁵ See Attorney General's Commission on Pornography, *Final Report* at 367: "From January 1, 1978, to February 27, 1986, a total of only one hundred individuals were indicted for violation of the federal obscenity laws." Even this low figure is deceptive, as the federal government had virtually ceased to bring any obscenity cases based on mainstream adult materials of the sort involved in this case.

nography." Convenience stores had removed the magazines from their shelves as a result.¹⁶ The court required the Commission to retract its remarks in the letter sent to the distributors, some of which had already withdrawn the plaintiff's magazines from circulation. 639 F. Supp. at 583-584, 588. Under *Bantam Books v. Sullivan*, 372 U.S. 58 (1963), the court held, the Commission had engaged in impermissible informal censorship: "the effect of what the defendants have done amounts to a prior administrative restraint of material which even the defendants appear to concede is constitutionally protected matter."

The Meese Commission's *Final Report* accordingly did not blacklist "distributors of pornography," but it did prominently advocate

¹⁶ If booksellers moved to drop such mainstream materials as *Playboy* in response to this relatively minor threat, how much more chilling a threat backed up by RICO forfeiture would be. The self-censorship which would flow from the use of forfeitures for obscenity violations is undeniable, and FFE fears that much protected material by and about women and about sexuality will be dropped from distribution in the shadow of this threat.

the use of RICO or other blanket forfeitures for obscenity offenses as a means to "efficiently suppress the evils of obscenity." Complaining that ordinary obscenity prosecutions were inadequate to the task of stemming the American public's enthusiastic consumption of adult entertainment, the Meese Commission advocated blanket forfeitures as "an effective means to substantially eliminate" businesses that disseminate erotica. *Final Report* at 464.

The Meese Commission directly spawned a new cadre of professional censors, the National Obscenity Enforcement Unit (NOEU), which Attorney General Meese created in February 1987.¹⁷ The Unit has increased in size and aggressiveness with every passing year. The federal courts have repeatedly been required to

¹⁷ Recently re-named the Child Exploitation and Obscenity Section, the unit focuses its efforts almost entirely on materials depicting only adults and intended for distribution only to willing adults, as in this case. In any event, its censorial activities cannot be justified by reference to the noble aspiration of "protecting children" any more than a similar mandate could save the censorial activities of the state commission in *Bantam Books*.

curtail its censorial activities, transparently designed to suppress protected media materials.

A few months after the Attorney General created the NOEU, the Justice Department changed its policy to encourage multiple-district obscenity prosecutions. In September 1987, a policy statement in the *U.S. Attorney's Manual*, which had previously prohibited such onerous prosecutions, was replaced with an exhortation that multiple prosecutions were "*encouraged . . . where the size of the [defendant's] organizational structure suggests that a multiple district approach will be most effective.*" *U.S. Attorney's Manual* § 9-75.310 (October 1, 1988). In public statements, Justice Department officials made clear that "most effective" meant the surest method of forcing distributors of erotic speech entirely out of business. Likewise, federal prosecutors have bluntly conceded the Department's aim in using the RICO Act in ob-

scenity cases: "We wanted to do RICOs to wipe out the business."¹⁸

The NOEU quickly became "a high-voltage prosecution machine," as the *Wall Street Journal* reported, launching "the most aggressive federal attack on pornography in decades."¹⁹

"The federal strategy is to threaten two or more criminal trials in quick succession in geographically disparate, and often politically conservative, jurisdictions. Many defendants fold under such pressure, often agreeing to guilty pleas barring them not only from future criminal activity, but also from the sale of any kind of sexually explicit material."²⁰

In three separate cases, federal courts have enjoined or dismissed these multiplicitous obscenity prosecutions designed to annihilate businesses engaged in erotic expression. See *Freedberg v. U.S. Department of Justice*, 703 F. Supp. 107 (D.D.C. 1988); *PHE, Inc. v. U.S. Department of Justice*, 743

¹⁸ *American Lawyer*, March 1988, at 98 (quoting NOEU attorney Cynthia Christfield).

¹⁹ Barrett, *Multiple Jeopardy? Porn Defendants Face Indictments in Courts Far From Their Home Bases*, *The Wall Street Journal*, July 27, 1990, at A1.

²⁰ *Id.*

F. Supp. 15 (D.D.C. 1990); *United States v. PHE, Inc.*, 965 F.2d 848 (10th Cir. 1992). Nonetheless, the government managed to use this tactic to obliterate several businesses, including the successful plaintiff in *Freedberg*.

Extolling a plea agreement he extracted from a defendant who faced four separate obscenity trials scheduled within seven weeks, and who "signed away [his] rights to do any business with sexually explicit material" under this coercive pressure, NOEU Director Patrick Trueman explained:

" 'We don't want to have to re-prove obscenity in a new trial against the [defendants], so under the agreement all we would have to show is that they were back in the "sexually explicit" business. . . . [The defendant's attorney] says these guys are forfeiting First Amendment rights. That's correct; they are. The reason is that they're criminals, and they can't be trusted.' " ²¹

Trueman has recently "credited his squad with reducing the size of the pornography business," and warns of more to come:

²¹ Barrett, *supra* n. 17, at A4.

"To Trueman, whose squad has . . . helped put a half-dozen major producers and distributors . . . out of business, the neighborhood video store is the next likely target.

"We'll prosecute the video store owner as well as the producer and distributor," Trueman said. "You'll see that . . . as we announce more and more indictments."²²

Clearly, the government's objective in these overbearing prosecutions has been to eliminate sexual materials from the marketplace. Under the First Amendment, however, the government has no business pursuing this agenda of attempting to purge American culture of sexual speech. Its obvious effort to do so through use of RICO forfeiture, first by direct suppression of targeted defendants and then by virtue of the inestimable chill this law and similar ones in the future would cast over all art and other expression, cannot survive First Amendment scrutiny.

Those who would impose their views on others, whether they advocate censorship to the end of purging public discourse of "indecenty"

²² *Denver Post*, November 4, 1990.

or of all but the most "politically correct" depictions of sexuality, are dis-serving the rights and interests of women, and of all Americans. The great soothing appeal of censorship must be rejected, unless we are to fundamentally depart from the tolerance and pluralism enshrined in the First Amendment as enduring values of our society.

CONCLUSION

For all the foregoing reasons, Amicus Curiae Feminists for Free Expression urges this Court to reverse the judgment below.

Respectfully submitted,

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September 2, 1992

APPENDIX A

FEBRUARY 14, 1992 LETTER FROM FEMINISTS FOR FREE EXPRESSION TO THE SENATE JUDICIARY COMMITTEE, OPPOSING SENATE BILL 1521

To the members of the Senate Judiciary Committee:

We the undersigned feminist women, write to oppose the misnamed Pornography Victims' Compensation Act, S. 1521. Supposedly an aid to victims of violent crimes, it scapegoats speech as a substitute for action against violence. Rape, battery, and child molestation are violent crimes that this nation should take every measure to eliminate. But S. 1521 will do crime victims more harm than good.

The premise of S. 1521 -- that violence is "caused" by words and images -- is false. Violence against women and children flourished for thousands of years before the printing press and motion picture, and continues today in countries like Saudi Arabia and Iran, where no commercial sexual material is available. Correlation studies, in this country, Europe and Asia, find *no* rise in sexual violence with the availability of sexual material. No reputable research shows a causal link between "obscenity" or "child pornography" and violence.

S. 1521 damages crime victims by diverting attention away from the substantive triggers to violence. Violence is caused by deeply-rooted, economic, family, psychological and political factors, and it is these that need addressing. Do so and you will gain the confidence and votes of millions of American women and men.

S. 1521 is a logical and legal muddle. It reinforces the "porn made me do it" excuse for rapists and batterers. This country does not accept get-off-the-hook reasoning for other crimes; we should not accept it for crimes most often committed against women. S. 1521 does not

even require a criminal conviction before a victim of violence may sue a bookseller or distributor for supposed causality. Criminals may go free, perhaps to rape again, while booksellers are punished.

Other confusions of S. 1521 present themselves. If a book is judged obscene in Louisville, Kentucky, it can be deemed the cause of a crime. The same book, judged not obscene in the nearby city of Lexington, cannot be the cause of a crime. Further, if Congress is certain that books and videos cause crime, why blame only books or videos on sexual themes? Why not blame the Bible, which scores of people every year cite as justification for abuse and murder? John List, who was discovered by the police two years ago after killing his mother, wife and three children for "religious" reasons, is only one of the more notorious examples.

S. 1521 is book banning by bankruptcy. It will suppress *across the nation* sexual material that may be offensive to some people in some communities. S. 1521 makes it easy to bring frequent suits for unlimited money damages against booksellers, publishers and distributors. Even if material is judged not obscene and not a cause of crime, legal costs will be ruinous to book, art and movie makers.

The most likely outcome of S. 1521 is that crime victims will in no way benefit while producers and distributors are put out of business. And the threat of court suits will create a chilling effect as all those engaged in free speech, in an effort to avoid the risk of liability, self-censor much material that is legal and valuable, and should be available to citizens in a democratic society.

Feminist women are especially keen to the harms of censorship, legislative or monetary. Historically, information about sex, sexual orientation, reproduction and birth control has been banned under the guise of "morality" and

the "protection" of women. Such restrictions have never reduced violence. Instead, they have lead to the jailing of birth control advocate Margaret Sanger, and the suppression of important works, from *Our Bodies, Ourselves* to novels such as *Ulysses*, *The Well of Loneliness* and *Lady Chatterley's Lover*, to the feminist plays of Karen Finley and Holly Hughes.

Women do not require "protection" from explicit sexual materials. It is no goal of feminism to restrict individual choices or stamp out sexual imagery. Though some women and men may have this on their platform, they represent only themselves. Women are as varied as any citizens of a democracy; there is no agreement or feminist code as to what images are distasteful or even sexist. It is the right and responsibility of each woman to read, view or produce the sexual material she chooses without the intervention of the state "for her own good." We believe genuine feminism encourages individuals to make these choices for themselves. This is the great benefit of being feminists in a free society.

We urge you to give S. 1521 the speedy death it deserves and turn your attention to constructive measures that will reduce violence and bring us all a more just and feminist future.

Sincerely,

(Organizations noted
for identification only.)

Betty Friedan

Erica Jong, author

Nora Ephron, author

Susan Isaacs, author
and sceenwriter

Mary Gordon, author

Adrienne Rich, poet

Ann Bernays, author

Jamaica Kincaid, author
and writer

Judy Blume, author

Katha Pollitt, author, educator and editor

Elizabeth Streb, choreographer, Ringside Company

Catharine Stimpson, professor, Rutgers
University

Susan Jacoby, author

Ann Snitow, author, professor, New School
for Social Research

Carole S. Vance, author; professor, Columbia
University School of Public Health

Amy Adler, attorney

Hannah Alderfer, graphic designer

Elizabeth Allgeier, Ph.D., professor of
psychology, Bowling Green University;
Editor, *The Journal of Sex Research*

Dorothy Atcheson, editor, Playboy Magazine

Susan M. Austin, sexuality editor,
child advocate

Margaret C. Ayres, executive director,
Robert Sterling Clark Foundation

Susan Ball, executive director,
College Art Association

Sydney Biddle Barrows, author and speaker

Nancy K. Bereano, editor and publisher,
Firebrand Books

Barbara Bernstein, executive director,
New York Civil Liberties Union,
Nassau County Chapter

Joan Bertin, associate director, ACLU Women's
Rights Project

Sara Blackburn, author and editor

Joani Blank, sex therapist

Lavada Blanton, Archdeaconry Executive
Committee, Episcopal Church, Brooklyn;
Long Island Diocese Episcopal AIDS
Commission

Janet Bode, author

Berit Branch, performer

Ann Veta Brick, attorney,
ACLU of Northern California

Peggy Brick, director of education,
Planned Parenthood of Greater Northern
New Jersey

Renata Bridenthal

Lea Brilmayer, professor,
New York University Law School

Patti Britton, deputy director,
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Council of the United States)

Laura N. Brown, director of trade
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Wendy Brown, director of feminist studies,
University of California, Santa Cruz

Ann Butler, night club proprietor (retired)

Judith Butler, professor of humanities,
Johns Hopkins University

Leslie Calman, director,
Barnard Center for Research on Women

Arlene Carmen, Judson Memorial Church, New York

C. Carr, journalist; staff writer, *Village Voice*

Ellen Carton, executive director, Gay & Lesbian
Alliance Against Defamation

Cheryl Cohen, Ed.D. candidate, Institute for the
Advanced Study of Human Sexuality

Gayle Cohen, acquisitions, Aires Films Releasing

Kelli Conlin, executive director, New York State
National Abortion Rights Action League

Blanche Wiesen Cook, author; professor of
history, John Jay College, The Graduate
Center (CUNY)

Margaret C. Crosby, ACLU of Northern California

Clare Coss, playwright, psychotherapist

Jackie V. Davidson, Ph.D., faculty, Institute
for the Advanced Study of Human Sexuality;
diplomate, American Board of Sexology

Lillian Davison, president, Research Retrieval

Karen DeCrow, attorney

Stacy D'Erasmus, editor, *Village Voice Literary Supplement*

Vanessa del Rio, stripper, singer

Donna Demac, author, professor,
New York University

Miki Demarest, chairperson, Taskforce of
San Francisco NOW

Betty Dodson, artist, author, sex educator

Barbara DORITY, co-chair, Northwest Feminist
Anti-Censorship Taskforce

Harriette Dorsen, publishing attorney

Mary D. Dorman, attorney

Frances Doughty, author, founding member of
National Gay and Lesbian Task Force

Siobhan Dowd, program director, PEN American
Center Freedom to Write Committee

Claudia Dreifus, journalist and author

Ellen Carol DuBois, professor of history, UCLA

Lisa Duggan, historian and author,
Virginia Foundation for the Humanities

Andrea Eagan, author

Alice Echols, visiting lecturer, History
Department, University of Michigan

Barbara Ehrenreich, author

Dorothy Ehrlich, executive director,
ACLU of Northern California

Kate Ellis, Rutgers University

Karen Finley, artist

Perri Fitterman, attorney

Sharon Fleicher, Ph.D., art historian

Vivian Forlander, independent film distributor

Evelyn Frankford, senior policy associate, SCAA

Arvonne Fraser, senior fellow, Humphrey
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Elizabeth I. Freedman, attorney

Nancy Friday, author

Janet Gallagher, attorney

Cynthia Gentry, Ph.D., Wake Forest University
department of sociology

Carol George, attorney

Holly Gewandter, composer/lyricist

Vicki Goldberg, author and critic

Jane S. Gould

Vanalyne Green, video artist, Chair of Video
Department of Art Institute of Chicago

Barbara Grier, CEO, Naiad Press

Elyse Grinstein, architect

Atina Grossman, professor of history,
Columbia University

Debra Haffner, sex educator

Barbara Handman, New York City Economic
Development Corporation

Donna Haraway, professor, History of
Consciousness Board,
University of California, Santa Cruz

Nina Hartley, adult video actress; lecturer

Brett Harvey, journalist, children's book editor

Charlayne Haynes, public affairs director,
New Museum of Contemporary Art

Marjorie Heins, director, ACLU
Arts Censorship Project

Nancy R. Heller, attorney

Elizabeth Hess, author

Jean Hirshfield, PEN Center West

Barbara Hoffman, attorney

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Confederation of the Arts

Amber Hollibaugh, filmmaker

Holly Hughes, playwright and performance artist

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Women's Health Action Mobilization

Wendy Kaminer, writer and lawyer

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Jean Somerville Kotkin, leader, Ethical Culture

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American Orthopsychiatric Institute

Sylvia H. Law, professor,
New York University Law School

Alisa Lebow, film student

Gloria Leonard, administrative director,
Adult Video Association

Judith Levin, professor, Rutgers Law School;
director, Women's Rights Litigation Clinic

Judith Levine, author

Jo List Levinson, co-chair, National Coalition
Against Censorship

Donna Lieberman, New York City
Civil Liberties Union

Bobby Lilly, chairperson, Californians Against
Censorship Together; East Bay NOW

Gloria Lockett, co-director, COYOTE

Catherine Lorde, author and teacher;
chairperson, Department of Art,
University of California, Irvine

Jeanette Luther, author; president,
Versatile Productions

Phyllis Lyon, author; California Feminist
Anti-Censorship Task Force

Jennifer Maguire, businesswoman;
Playboy Enterprises

Emily Mann, artistic director, McCarter Theater,
Princeton, New Jersey

Vivienne Maricevic, erotic art photographer

V. Mark, editor and publisher,
Village Voice Literary Supplement

Del Martin, author

Sue Martin, program coordinator,
Family Violence Prevention Fund

Donna J. McBride, vice president and operating
officer, Naiad Press

Carlin Meyer, professor, New York Law School

Branda Miller, associate professor of art,
Rensselaer Polytechnic Institute

Samantha Miller, co-director, COYOTE

Honor Moore, playwright and poet

Laurie Muchnick, editor, *Village Voice*

Elizabeth Murray, artist

Charlotte Murray, executive director, National
Association of Artists' Organizations

Maryann Napoli, Center for Medical Consumers

S. Lee Nason, vice president, Shawmut Bank

Mary Nealon, chair, New York Gay and Lesbian
Alliance Against Defamation

Joan Nestle, author and historian

Barbara O'Dair, author, editor

Denis O'Dell

Marcia Orovitz, vice president, General Media

Jan Oxenberg, film director

Marcia Pally, author

Lynn M. Paltrow, senior staff attorney, ACLU
Reproductive Freedom Project

Kay Perri

Jane Petro, M.D., associate professor of surgery, New York Medical College; president, American Association of Physicians for Human Rights

Isabelle Katz Pinzler, director, Women's Rights Project, ACLU

Nancy Klien Piori, Barnard College

Carol Queen, San Francisco NOW; president, Sexual Sanity

Cindy Rakowitz, businesswoman

Sandy Rapp, musician and author; political director, East End Gay Association

Gini Reticker, filmmaker

Catherine Reynolds

Ramona Ripston, executive director, ACLU of Southern California

Nanette Roberts, teacher, church worker

Estelle Rogers, attorney

Reverend Lois Rose, United Church of Christ

Susan Deller Ross, law professor, Georgetown University Law Center

Roberta Roskam, MSW, diplomate, American Board of Sexology; clinical member, Association for American Family Therapy

Candida Royalle, American Association of Sex Educators, Counselors & Therapists; Femme Productions, Inc.

Maggie Rubenstein, Ph.D., sexologist and therapist

Gayle Rubin, author and anthropologist

Catherine Saalfeld, video maker and journalist

Connie Samaras, artist; professor, U.C. Irvine

Marlene Sanders, television journalist

Lorna Sarrel, lecturer in psychiatry,
Yale University

Carol T. Schreiber, Ph.D.

Joan Scott, professor of social science,
Institute for Advanced Study

Carol Seajay, Feminist Booksellers News

Barbara Shack, chair, New York State
Coalition for Choice

Vivian Shapiro, vice president, Top Value Media

Catherine Siemann, ACLU

Joy Silverman, National Campaign for
Freedom of Expression

Barbara Simon, general counsel, Institute for
First Amendment Studies

Gail Simon, president, Woman Home Video

Barbara Smith, Ed.D., president,
B.J. Smith Assoc.

Toni D. Smith, MSW, Ph.D. candidate, Institute
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Annie Sprinkle, sex educator

Christine Stansell, professor of history,
Director of Women's Studies,
Princeton University

Laurie Stone, author, *Village Voice* columnist

Nadine Strossen, professor, New York Law School;
president, ACLU

Tina Summerlin, director,
Robert Mapplethorpe Foundation

Kat Sunlove, author and performer

Judith Tannenbaum, associate director,
Institute of Contemporary Art,
University of Pennsylvania

Nadine Taub, professor, Rutgers Law School

Ava Taurel, psycho-dramatist; president,
Taurel Enterprises

Meredith Tax, PEN American Center

Joan Kennedy Taylor, author;
national coordinator, Association of
Libertarian Feminists

Katie Taylor, New York City
Commission on Human Rights

Kate Thomas, RN, MS; doctoral candidate,
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Human Sexuality

Sharon Thompson, author

Leonore Tiefer, psychologist and psychotherapist

Susan Trowbridge, vice president, Addison-Wesley
Publishing Company

Marcia Tucker, director, New Museum of
Contemporary Art

Alice Turner, editor, Playboy

Roz Udow, National Coalition Against Censorship

Veronica Vera, author

Brenda Webster, acting chair, PEN Center West;
chair, PEN Women's Committee

Marley Weiss, professor, Univerity of Maryland
Law School

Jane Whicher, staff attorney, ACLU of Illinois

Norma Wickler, professor emeritus, University of
California at Santa Cruz

Ellen Willis, professor of journalism,
New York University; Union of Democratic
Intellectuals

Martha Wilson, artist and teacher; director,
Program in Art, California Institute of the
Arts

Hilma Wolitzer, author

Cathy Young, author

Gilda Zwerman, associate professor of sociology,
State University of New York at Old
Westbury; psychotherapist

APPENDIX B

SELECTED BIBLIOGRAPHY REGARDING WOMEN'S OPPOSITION TO CENSORSHIP OF PORNOGRAPHY

- Judith Becker and Ellen Levine, *Dissenting Report, Attorney General's Commission on Obscenity and Pornography* (1986).
- Mary Kay Blakely, *Is One Woman's Sexuality Another Woman's Pornography?* *Ms. Magazine* (April 1985).
- Varda Burstyn, ed., *Women Against Censorship* (1985).
- Dorothy Dinnerstein, *The Mermaid and the Minotaur: Sexual Arrangements and Human Malaise* (1976).
- Lisa Duggan, *Censorship in the Name of Feminism*. *Village Voice* (October 16, 1984).
- Feminist Anti-Censorship Task Force, *Caught Looking: Feminism, Pornography, and Censorship*. Caught Looking, Inc., New York (1986).
- Nan D. Hunter and Sylvia A. Law, *Brief Amici Curiae of Feminist Anti-Censorship Taskforce et al., in American Booksellers Association v. Hudnut*, 21 J. of Law Reform 69 (1988).
- Neil Malamuth and Edward Donnerstein, eds., *Pornography and Sexual Aggression* (1984).
- Herbert Marcuse, *Eros and Civilization* (1955).
- Alice Miller, *For Your Own Good* (1983).

Marcia Pally, *Sense and Censorship: The Vanity of Bonfires*. Freedom to Read Foundation, New York (1991).

Out of Harm's Way: The Great Soothing Appeal of Censorship. Index on Censorship (Oct. 1992).

David A. J. Richards, *Free Speech and Obscenity Law: Toward a Moral Theory of the First Amendment*, 123 U. Pa. L. Rev. 45 (1974).

Ann Snitow, et al., eds., *Powers of Desire: The Politics of Sexuality* (1983).

Nadine Strossen, *The Convergence of Feminist and Civil Liberties Principles in the Pornography Debate*, 62 N.Y.U.L. Rev. 201 (1987).

Reay Tannahill, *Sex in History* (1992).

Carole Vance, ed., *Pleasure and Danger: Exploring Female Sexuality* (1984).